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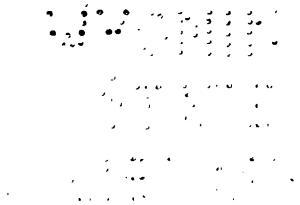

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NOVA SCOTIA.

REPORTED BY

BENJAMIN RUSSELL, M. A.,

AND

SAMUEL A. CHESLEY, M. A.,

Barristers-at-Law.

VOLUME III.

1877-79.

HALIFAX, N. S.:
A. & W. MACKINLAY.
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JUDGES OF THE SUPREME COURT

DURING THE

PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

Chief Justice.

THE HONORABLE SIR WILLIAM YOUNG.
(Appointed 3rd August, 1860.)

Judge in Equity.

THE HONORABLE JOHN W. RITCHIE.
(Appointed Assistant Judge 28th September, 1870. Appointed Judge in Equity 9th July, 1873.)

Assistant Judges.

THE HONORABLE WILLIAM FREDERICK DESBARRES.
(Appointed 14th November, 1848.)

THE HONORABLE LEWIS MORRIS WILKINS.
(Appointed 14th August, 1856. Resigned, 1878.)

THE HONORABLE HUGH McDONALD.
(Appointed 5th November, 1873.)

THE HONORABLE HENRY W. SMITH.
(Appointed 15th January, 1875.)

THE HONORABLE ALEXANDER JAMES.
(Appointed 8th January, 1877.)

THE HONORABLE ROBERT L. WEATHERBE.
(Appointed 7th October, 1878.)

Attorneys General.

THE HONORABLE ALONZO J. WHITE.
(Appointed 18th January, 1877. Resigned 15th October, 1878.)

THE HONORABLE JOHN S. D. THOMPSON.
(Appointed 22nd October, 1878.)

ERRATA.

Page 10, line 39—After "R. & C., 1 Eq.," insert "68."
" 40, " 18—At commencement of line insert "not" before "follow."
" 87, " 7—For "seizure" read "seizin."
" 97, " 9—For "from" read "on" after "appeal."
" 107, " 37—Between "at" and "within" insert "or."
" 258, " 25—For "here" read "before" after "raised."
" 362, " 26—For "applied" read "implied," (line 7 of head-note.)
" 600, " 39—For "plaintiff" read "defendant," (line 3 of head-note)

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CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER, 1877, TO APRIL, 1878.

WALKER *v.* CUNNINGHAM.

PLAINTIFF hired Defendant to travel and sell certain goods for him for cash or approved notes, to return such goods as were not disposed of and account for the proceeds of those sold. Defendant having failed to account, this action was brought, the declaration containing a count in trover and a count for money had and received. Defendant having been shewn Plaintiff's account for the goods, by his Attorney, admitted it to be in the main correct, and offered to pay $100, (being less than the Plaintiff claimed,) which was refused, and on Plaintiff's Attorney asking Defendant if he would neither account for the goods, nor give them up nor pay for them, Defendant said he would do neither. *Held* that this answer was no evidence of a wrongful conversion, there being no evidence that the Defendant when he made it had any of the goods in his possession, as he had previously stated to Plaintiff's Attorney that he had sold them all.

The Plaintiff stated in his evidence that Defendant had promised to come to his place and settle, and that he (Plaintiff), understood from the Defendant on that occasion that all the goods were sold, except a few bridles. This evidence was not contradicted by the Defendant. *Held* that it was not sufficient to warrant the conclusion that the goods were sold for cash, as the Defendant was authorized to sell either for cash or approved notes.

Semble, that under the evidence the Plaintiff could have recovered on a count for not accounting.

DESBARRES, J., now (Dec. 11th, 1877) delivered the judgment of the Court:—

The plaintiff, being a saddler and harness-maker and dealer in sewing machines, hired the defendant to travel and sell certain goods for him, for cash or approved notes, at the prices fixed and limited by him, and defendant was to return such goods as could not be disposed of. The defendant having failed to account for and pay over the proceeds of the goods entrusted to him for sale, or to return such as remained unsold, if there were any, the present action was brought, in which the plaintiff in one count declared for a wrongful conversion of the goods, and in the other, on the common counts

for money had and received, &c. The cause was tried at Pictou in June, 1876, and a verdict was taken for the plaintiff, by consent, for $650, subject to the opinion of the Court on the following points raised at the trial: *first*, that there was no conversion; and *secondly*, that trover could not be maintained under the circumstances of this case. The goods having been placed in the hands of the defendant for the purpose of being sold for plaintiff's benefit, it is clear that trover will not lie against the defendant for the goods, without a demand upon and a refusal by him to deliver them up, and the first question that arises is whether there was such a demand made as will entitle the plaintiff to recover for a conversion of these goods. No such demand was ever made by the plaintiff himself, but it is contended that it was made by Mr. Holmes, the attorney and agent of the plaintiff, at the office of, and in the presence of D. C. Fraser, both of whom were called and examined as witnesses on the part of the plaintiff. Fraser says that Holmes asked defendant if he would account for or deliver up the goods, or pay for them, and defendant said he would not, but that in order to settle the matter he would give $100. On his cross-examination he says that defendant refused to pay the full amount claimed and said something about not having all the goods in his possession. Holmes states that at his interview with the defendant on this occasion he shewed him the plaintiff's account, and, after going over all the items, defendant acknowledged the account to be mainly correct, objecting only to some hame straps; that he asked defendant why he did not pay the account, and he replied that he did not know; that on defendant offering to pay $100, he (Holmes) said to him: "Am I to understand that you will neither account for these goods, give them back nor pay for them;" and defendant replied that he would do neither. This was probably regarded as a very unsatisfactory answer for a person hired to sell goods to give to his employer; but the question is whether the answer is evidence of a wrongful conversion of the goods. In order to make a demand and refusal sufficient evidence of a conversion, the party refusing must have it in his power to deliver up or detain the articles demanded. There is no evidence that the defendant had any of the goods delivered to him for sale in his possession at the time Holmes had the con-

versation with him in Fraser's office. It would appear from a previous conversation which the plaintiff had with the defendant, in which the latter stated that he had sold all the goods and would settle for them, that he could not then have had them in his possession. It is evident that the plaintiff believed the defendant's statement in that respect, for while he, on several subsequent occasions, pressed the defendant to account and settle for the goods, he never, on any occasion, asked him to return any of them. In the absence of any proof to the contrary, I think it must be presumed that at the time Holmes required the defendant to give up the goods, the latter had not the power of delivering them up, and that his refusal on that demand cannot, for that reason, be considered as sufficient evidence of conversion.

The object of Mr. Holmes' interview with the defendant seems to have been to get the defendant to account for and pay over the proceeds of the goods placed in his hands, and not to get back the goods themselves, which, from the defendant's previous statements, could hardly have been supposed to be then in his possession. I am therefore of the opinion that there is no evidence upon which the verdict can be sustained, on the count in trover, and we must turn to the other count and see whether there is any to support it on that. The plaintiff states that he saw the defendant at Antigonish on the 9th October, 1875, and asked him to settle with him, and that he promised to come to his place and do so, adding that he understood from the defendant on that occasion that all the goods were sold except a few bridles. Now the defendant had the opportunity of contradicting that statement, if he felt satisfied he had not made it, but he did not come forward and deny it, and, standing as it does uncontradicted, it must be assumed to be true. If true, an important question remains to be considered, and that is, whether the admission so made by defendant is to be taken to be an admission that the goods were sold for cash; if for cash, and it was actually received by defendant, then the plaintiff is entitled to recover on the money count; but if sold on time, and notes were taken in payment, which remain unpaid, though the defendant may have neglected to hand them over to the plaintiff, he cannot, as I think, recover on this count. The case of *Wells v. Ross*,

7 Taunt., 403, was cited by the plaintiff's counsel to show that goods sold by an agent must be taken to have been sold for money. That principle may be a sound one, but it does not apply here, as the present is a very different case from that. In that case it was proved that the defendant sold the goods on commission, and, having no discretion to sell for anything else, it was held that it was to be considered the defendant had sold them for money, and that he had received it. In this case the defendant had the option of selling the goods either for money or approved notes, and there is no evidence to show upon what terms they were actually sold, which was an essential fact that the plaintiff has failed to prove. To entitle the plaintiff to recover on the common count, it must be shewn that the defendant received the money for the goods sold. Proof merely of the sale of the goods where the defendant was authorized to sell either for cash or approved notes, is not of itself enough to warrant the conclusion that they were sold for cash, and therefore it seems to me impossible to sustain the verdict found for the plaintiff on either of the counts set out in the writ. There can be no doubt from the evidence that the defendant disposed of the goods placed in his hands for the purpose of being sold, and if the writ had contained a count for not accounting, there could have been no ground whatever for disturbing the verdict; but it is now too late to add that count. I think the rule for a new trial must be made absolute with costs.

RUMSEY v. HARE.

PLAINTIFF, on the 16th August, 1875, issued a writ of attachment against defendant, an absconding debtor, the affidavit of debt describing him as a trader. Defendant's goods were attached August 30th and, pursuant to a judge's order, made September 4th, were sold on September 15th, and the money was paid into Court on October 7th to respond the plaintiff's judgment, after which, on the 19th of October, proceedings were taken under the Insolvent Act of 1875, to put defendant's estate in compulsory liquidation, and the estate passed into the hands of the assignee. Plaintiff claiming a lien under his attachment: *Held* that the assignee was entitled to the money paid into Court.

THIS cause was argued during the last term of the Court. The facts are stated in the above head-note.

Sedgewick, for the assignee, refers to section 16 of the Insolvent Act of 1875, providing that the assets of the insolvent

shall vest in the assignee, "under the same charges and obligations," that the insolvent was liable to with regard to the same. This is the only section upon which plaintiff can rely. "Subject also to the provisions of this Act," must be considered as an understood part of the clause. For instance, there would be no lien in the case of an execution. The Act takes away a number of liens. There is a difference between the insolvent's being liable and the goods being liable. The Act here says, as *he* was liable to. The goods may have been subject to certain liens which are taken away by the Act. The phrase "charges and obligations," does not comprehend *lien*. Both charges and obligations must be made by act of the party. All that is meant by these words is charges and obligations which the insolvent himself made upon those goods. "Obligation" is from the civil law. It means contract, and does not comprise liens. The word lien is not in the statute.

The defendant in this suit did not create a lien, and in order to include a lien under the term "obligation," the plaintiff must show that it is created by an act of the party. An obligation presupposes parties.

YOUNG, C. J.—Is not the right of the plaintiff a *charge* upon that money?

Sedgewick.—No, the defendant could compel the Court to give him that money. The clauses of the Act of 1869 are, 10, 29, 59, 216. None of these is like clause 16 of 1875. Cites *Almon v. Gray*, R. & C. 1 Eq. 6.

WILKINS, J., refers to the inference arising from "ordinary attachment" being left out of the Act of 1875, although included in the Act of 1869 among the liens broken up by the Act, and suggests that the omission of the words "ordinary attachment" in the Act of 1875, raises an inference that the lien created by an attachment was meant to be preserved.

Sedgewick.—The inference is not irresistible, because the effect of that inference would be to defeat the intention of the Act.

Meagher contra.—The motion has not been made to the proper tribunal, or in proper form. There is only one way, and that is to set aside the order to sell the goods. The order is in compliance with the Act, that the money is to be paid over

to respond the judgment to be obtained. Even according to the assignee's contention the application is made too soon. It must be postponed till the money is in the hands of the Sheriff.

The sale, in view of the statute, makes a material difference between the plaintiff's rights under the order and his rights under a mere writ of attachment. I have a right to follow up my proceedings and get my judgment.

The assignee can only exercise the rights of the insolvent, subject to the *charges and obligations* he was liable for. He is only in the position of the insolvent himself. *Edgar & Christler's* Insolvent Act, 62; *Insolvent Act of* 1875, sec. 82 & 83. Where a voluntary payment was made under an execution it was held in Canada that the assignee could not take it because it was not levied. There is the same distinction here, because there could *be no levy* under an attachment.

In the Act of 1869 the word "attachment," as applicable to attachments of this kind, appeared in several places. In 1875 it is not mentioned. The inference is that the lien under attachment was to be preserved. *Expressio unius exclusio alterius.* See *Niel v. Smith*, Can. Law Journal, 1873, p. 75. A statutory lien can only be taken away by an express enactment. Now, when the word attachment is not mentioned in the Act, how can the lien be taken away by it? L. R., 7 Exch., 95; *Potter's Dwarris*, 221; *Fisher*, 8223.

Under section 84, we are secured creditors. *Ex parte Tate Eng.* L. J., *Bankruptcy*, vol. 43, p. 55, 103; *Ex parte Lovering*, 58; *McMahon's Insol. Act*, p. 59; *3 L. R. C. P.*, p. 415.

Almon v. Gray, 1 R. & C., Eq., p. 6, was under the Act of 1869, and the registration of both writs took place on the same day.

Sedgwick in reply.—The only security protected by the Act is one created by the party himself, and not by the law. In the case *ex parte Tate*, the lien was created by the act of the party himself. (SMITH, J.—Would a confession of judgment give a preferential lien?) Yes, except as expressly taken away by the Act when made within a specified time.

YOUNG, C. J., puts the case of a mortgage where the *party himself* is not liable, yet the lien would be protected by the Act.

Sedgewick.—The Insolvent Act of 1864, U. C., provided that an execution, if in the Sheriff's hands one month, should be protected. Under that Act, see *Canada Dig.*, p. 426; *Harrison's C. P. A.*, p. 487, 488.

McDONALD, J., now, (December 11th, 1877,) delivered the judgment of the Court:—

On the 16th day of August, 1875, a writ of attachment was issued against the defendant, an absconding debtor, the affidavit of debt describing him as a trader. Under that writ his goods were attached by the Sheriff of Hants on the 30th day of the same month, and on the 4th day of September following a judge's order was obtained for the sale of the goods, the proceeds to be paid into Court to respond the judgment. A sale took place accordingly on the 15th day of September, and the money was paid into Court on the 7th day of October, 1875. During the whole of this time no proceedings were taken to put the estate of the defendant in compulsory liquidation, but such proceedings were taken on the 19th day of October, and the defendant's estate passed to the assignee.

The Insolvent Act of 1869, excepting in matters of procedure, remained in operation till the first day of September, 1875, and if before that date proceedings in insolvency had been taken against the defendant, the question now before us would not likely have arisen, namely, who is entitled to the money paid into Court, the plaintff or the assignee under the Insolvent Act, because section 116 of the Act of 1869 provides that all the assets of the insolvent shall pass to the assignee, "although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ." The sale here mentioned I take to be a sale made, not under an order, as in this case, which is only granted in exceptional cases when the proceeds of the sale are to remain under the control of the Court and represent the property levied upon as if no such sale had taken place, but a sale under a writ of execution, after proof of the debt, and a judgment entered, and after a bond of indemnity shall have been given to be available in case the judgment shall be reversed.

The Act of 1875 which, except in certain matters of procedure, as already mentioned, came into operation on the 1st day of September, 1875, and before the sale in this case, provides by section 83 that no lien or privilege upon either the real or personal estate shall be created for the amount of any judgment debt, or the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor has been assigned to the assignee, or if proceedings to place the same in liquidation under this Act have been adopted, or are still pending. It will be seen that this section, though it mentions executions, does not, like the Act of 1869, mention "ordinary writs of attachment," and it is, therefore, contended that the lien which, before the passing of the Insolvent Act, is said to have attached to the estate of the absconding debtor when a levy was made under a writ of attachment, was not taken away by the Act of 1875, under which the proceedings in insolvency were instituted against the defendant in this cause, and that, although it is provided that a levy, and even a sale, under a writ of execution, issued in other cases after judgment, does not prevent the property levied upon, or the proceeds of the sale thereof, from passing to the assignee free from any lien or privilege, yet a writ of attachment based upon a mere affidavit of the plaintiff, without judgment, and without proof or adjudication, if levied upon property which is subject to be relieved upon the defendant presenting special bail, creates such a lien as prevents the property and the proceeds thereof from passing to the assignee. I cannot think that such was the intention of Parliament as we must gather it from the Insolvent Act.

Unless the plaintiff, in an action against an absconding debtor, proves his claim, obtains his judgment and his writ of execution, his attachment avails nothing. It is, in ordinary cases, under the writ of execution alone, that he can compel payment of the amount of his judgment against the absconding debtor. And the Insolvent Act of 1875, under which this estate was put in liquidation, provides that "if before the payment over to the plaintiff of the money actually levied,"

proceedings to put the estate in liquidation have been adopted, &c., no lien or privilege shall be created under the execution, so as to prevent the assets from passing to the assignee. The Insolvent Act provides that if a trader absconds his estate is subject to compulsory liquidation, and the moment that he does abscond all his creditors have an equal right to proportionate shares of his assets, provided the necessary steps be taken. But, here, one of the creditors endeavors to *defeat* that right by reason of the very act of bankruptcy that *gives* the right. Surely the Act which provides for a proportionate distribution of the assets of an insolvent estate among the creditors, upon the debtor committing a certain act of bankruptcy, is inconsistent with that which, as here contended, enables one of the creditors to take all the assets to pay his own debt, on the ground that the debtor committed that same act of bankruptcy. Then the question arises, has the Parliament of Canada the power to repeal so much of our local Act relating to absent or absconding debtors as is inconsistent with the provisions of the Insolvent Act? I am of opinion that such power exists, and as it was exercised by passing section 154 of the Act of 1869, and section 149 of the Act of 1875, I am of opinion that the assignee is entitled to the money paid into Court. I am of opinion also that the plaintiff does not now, on strictly legal grounds, occupy a more favorable position than if the Act of 1869 were still in force, for that Act provides that "no ordinary writ of attachment" would prevent the attached property from passing to the assignee before sale, and it repealed all such parts of our provincial statutes as were inconsistent with that provision. Those inconsistent parts of our local Acts so repealed have not been re-enacted by competent legislative authority, and cannot prevent the operation of the Insolvent Act of 1875.

IN RE FRASER & PAINT.

FRASER AND PAINT, having terminated their partnership business, referred all their disputes of every description to the award of two arbitrators and such umpire as they should select before entering upon their duties as abitrators. Authority was given to the arbitrators or any two of them to enlarge the time for making the award, and the two originally appointed extended the time, and after doing so, selected an umpire and entered upon the inquiry. Desiring to obtain all the information possible, the arbitrators, without the request of either party, called before them certain persons, neither of the parties being present, but it appeared that the persons so called had no evidence to give about the matter in controversy, and no objection was taken by the party moving to set aside the award, who knew that the arbitrators had called such persons before them, but yet continued to attend and conduct the reference on his own behalf. The partnership was indebted to Fraser in the sum of $52,840, and there was due to it by Paint $2024, and the award directed that the assets should be held and managed by Fraser under the inspection of the Umpire, and that the sale of the partnership property should be made by him at such times and places as the Umpire should approve. The award was made 28th September, 1875, and no motion was made to set it aside until March, 1876, the objecting party having in the meantime, with knowledge of the facts upon which he based his objections, proceeded with the arbitration, attended the sale of the property, and, at the request of the auctioneer, furnished information as to the boundaries of the land.

Held that the application to set aside the award was too late, not having been made within one month, as required by the statute, nor within the time allowed for moving for a new trial, as would be necessary had the submission not been made a rule of Court; that the conduct of the arbitrators, although in one respect indiscreet, was in the whole unexceptionable, and that the conclusions of the arbitrators were legal and within their authority.

Held further, that under Section 22 of Cap. 109, R. S., the Judge in Equity was warranted in ordering that in case Paint should refuse to execute a deed required to effectuate a sale directed by the arbitrators to be made, the same should be made by a master of the Court.

Quære, whether the matter was a "cause" within the meaning of Section 42 of Cap. 95, R. S.

THIS cause came before the Court on an appeal from two orders made by his Lordship the Judge in Equity, one discharging a rule *nisi* to set aside the award made in this matter, the other providing that in case of the refusal of Henry N. Paint, a party to the submission, to execute a deed required to effect a sale which the arbitrators directed to be made, the same should be executed by a Master of the Court. The decision of the Judge in Equity, in which are stated the grounds relied upon in attacking the award and the reasons for upholding it, will be found in *R. & C., 1 Eq., q. v.*

Both the appeals were argued at the same time during the last term.

Graham for appellant.

The reservation of the authority to the umpire in regard to the inspection and management of the assets, and the sale of the real estate under the directions of Taylor,—that is the delegation to one of the arbitrators of that authority,—is illegal.

The arbitrators could not reserve that to themselves. When they make their award they are *functi officio*. The case of the auctioneer put by His Lordship is different from this. That is the reservation of a ministerial power. The one in question, inspection and management, is the reservation of a judicial power. *Russell on Awards*, 266, 267, 269, 270. (WILKINS, J.—The objection is to the finality. How does this interfere with that?)

Fraser is to have control of assets under inspection of Taylor the arbitrator. The power was not given them in the submission to do that. (WILKINS, J.—Could you object to their giving the exclusive power to Fraser? RITCHIE, E. J.—If they could not give that power to Fraser or to a third party, they could never settle it at all. WILKINS, J.—I take it that the inspection is for the benefit of Paint. It is virtually an advisory position. MCDONALD, J.—Even if that is beyond the powers of the arbitrators, does that vitiate the whole award? RITCHIE, E. J.—The arbitrators have settled everything but the carrying out of the award. WILKINS, J.—If not *intra vires* it would be struck out.) *Russell on Awards*, 653. A collector could not be appointed to receive assets. The award virtually makes Taylor the receiver. It gives him supervision and control. *2 Ad. & E.*, 356; *11 U. C., Q. B.*, 114.

The evidence of Fairbanks and West was improperly received in the absence of Paint. The only question is whether this was waived by Paint; *6 Q. B.*, 637. The mere silence of the party is not sufficient, as it relates to the administration of justice. We cannot look at the question whether the evidence was material or not. It is impossible to tell what effect evidence may have on the minds of the arbitrators. *6 Vesey*, 72. (WILKINS, J.—The arbitrators say that this evidence had nothing to do with the matter in dispute.) The cases show that it is not enough for the arbitrator to say that it *does not affect his mind*. (RITCHIE, E. J.—That is quite a different thing. They say here that it was not material.) That makes them the judges of the materiality of evidence. *Hart* told *Paint* that Fairbanks had contradicted him; and he might have been called to affect Paint's credibility, yet it might be strictly true as stated, that there was no evidence given material to the matter in dispute. The affidavits in reply to

Paint's affidavit ignore the report of Hart's statement in reference to the evidence of Fairbanks.

As to the appeal from the order that a Master should execute the deeds. By the award certain lands were ordered to be sold. As Paint had an interest, a deed was tendered to him for execution. It was ordered that both the parties should execute the necessary deeds. The only way of enforcing that in a summary way would be by attachment. At common law the Court could not order the land to be conveyed by the Master so as to convey a perfect title. But it is claimed to be allowable under R. S., Cap. 95, Section 42. My contention is that this statute applies to a suit for specific performance of a contract. There is no suit brought in equity in this case. It is a submission out of Court. It only happens that it is in the Equity Conrt. It could have been made a rule of the common law side. Paint is not a party to a cause, and the Equity Court had not the jurisdiction to make the order.

Ritchie, Q. C., contra.—This motion is too late. 9 & 10, William III.; *Russell on Awards*, 636; *Redman*, 202; *2 Daniel Ch., Pr.*, 1858; *3 M. & K.*, 431; *L. R., 1 C. P.*, 401; *Harris vs. McCormack*, Mar. 1869, (unreported).

As to the point not taken in this argument, but taken before, that the party could not move to set aside until motion is made to enforce, see 1 *Cowper* 23.

R. S., p. 596, Sec. 10 & 12, (under statute of William III.) make it necessary to apply within one month. Section 10 puts the two kinds, compulsory and voluntary arbitrations, on the same footing as to setting aside. Section 12 provides that in the case of compulsory references, the application must be within one month. The grounds of objection to the award are too general. *Redman on Awards*, 211; *1 D. & L.*, 711; *3 Ad. & E.*, 200.

As to the delegation of the power to the umpire, that is no objection. The award is final, and did not reserve anything, for they gave Fraser the control, and in case Paint might raise a difficulty, Taylor would settle it. It had nothing to do with the final determination of the matters in controversy. *3 B. & Ad.*, 295, is a case very like this. It was held that although

the direction to leave to a third party was not good, it did not vitiate the award. S. C. in *Redman*, 140; *Russell*, 266.

As to the reception of evidence;—in the case cited, the evidence was received in the absence of one of the parties. Here it was in the absence of both parties. In *Moore vs. Powley*, 1 Thomson, 115, it was held that in the absence of both parties the taking of the evidence does not invalidate the award.

The right to except on that ground was waived. Paint attended and examined witnesses after these parties had been examined, knowing that they had been so examined, and afterwards attended the sale and assisted in the carrying out of the award. *Redman*, 96; *Russell*, 187, citing *Drew vs. Drew*.

(SMITH, J.—Is there any evidence to show the knowledge on the part of Paint?) (*Weatherbe.*—They swear to it in a very general way. I do not see how they can say he knew it.) They say that he knew it and he does not contradict it.

As to the second appeal: The award directs that *Fraser & Paint* shall sign necessary deeds. As soon as the arbitration is made a rule of Court, it is a case in Court, and the award is the same as a judgment in the Court, and can be enforced in the same way. It is really a decree for specific performance. The section refers generally to causes in Court, and not specially to cases for specific performance. An attachment is not a remedy. The party might prefer to stay in jail rather than execute.

Graham in reply.—If the objections are not specifically stated, the rule should be set aside as bad. They are all stated as specifically as it is usual to take them in rules *nisi* in England, where the rule is that all objections in all rules *nisi* shall be specifically stated. Under that rule it is held in England that it is sufficient to say upon the grounds set out in affidavits. I refer to a recent English rule.

If the rule is not sufficient, the affidavits here help us, and make the objections sufficiently specific. *Russell on Awards*, 667. The objections relied on here are specifically set out in the affidavits.

With regard to the delay in moving: The statute of William III., provides that the motion must be made on or before the last day of the next term after making and publishing the

award. That cannot apply to that extent, as their terms are so different from what they are here. They have a rule that you cannot move for an attachment on the last day of term, but here an order *nisi* was moved for on the last day. Our July and December terms are abolished, and there is only one term in each year. Therefore I do not think that statute can apply.

We are here in the Equity Court. There is no term in the Equity Court. This submission provided for making it a rule of the Equity Court, and it is not merely the submission that is a rule of Court, but the award itself is a rule of Court. We are in the Equity Court, therefore, where there are no terms, and the only rule applicable to the case is that we must move in reasonable time. (RITCHIE, E. J.—The common law rule is that you should move within the same time as for a new trial.)

Our statute provides that you can make it a rule of Court, whether that is contained in the submission or not, unless a contrary intention appear. The statute of William III. is different.

As to the waiver by attending the sale, it would be a hardship if the party was bound by that. Cites *7 Beavan*, 455-464. The delegation of authority cannot be considered as surplusage, and struck out as suggested.

On the second appeal: There is no *cause* unless commenced by a writ. The term *cause* is not applied to cases of this sort, even after the reference is made a rule of Court. Cites *1 Hare*, 276, as to attacking the award by cross motion. *2 Atk.*, 501.

SIR WILLIAM YOUNG, C. J., now (Dec. 11th, 1877,) read the judgment of the Court, prepared by WILKINS, J.:—

These matters came before this Court on two appeals from the Court of Equity. This Court heard them both argued together in the present term. The first was an appeal from an order made by the learned Judge in Equity in discharging a rule *nisi* to set aside an award made between the parties, the submission and award having been previously made a rule of the Court of Equity. The second was an appeal from an order of that Court to the effect that in case of

a refusal or neglect by the defendant, Paint, to execute within a specified period, a deed in the order named,—the execution of a deed by him after a sale of land ordered by the award having been directed by the arbitrators,—the same should be executed by a Master of the Court.

First as regards the first order appealed from. No less than sixteen grounds of appeal are stated in the petition for appeal. The written decision of the learned Judge in Equity was read at the argument. Among other reasons for his judgment he expressed an opinion that, even assuming the award to be open to any of the objections urged against its validity, the motion to set it aside had been made too late. The award appeared to have been made on the 28th September, 1875, and the order *nisi* to set it aside was not obtained until the 13th of March, 1876. The learned Judge considered the effect of 9 & 10 William III., c. 15. He reviewed the Equity and Common Law authorities, and concluded, with perfect propriety as we think, that the application to set aside having been made neither within one term after the award was published, as required by the statute, nor within the time allowed for a new trial, as would have been necessary if the submission, &c., had not been made a rule of Court, the delay precluded any objection that might otherwise have been made against the award. Independently, however, of this preliminary obstacle to impugning the award, we see no reason for differing from the learned Judge in the views expressed by him, to the effect that the conduct of the arbitrators, although in one instance marked by indiscretion, was in the whole unexceptionable. At the same time, viewing the award in the light of the submission and the evidence, I see no reason to doubt the propriety or legality of the conclusions of the arbitrators, or that these last were within the powers of the arbitrators. That appeal, therefore must, in my opinion, be dismissed with costs.

The second matter of appeal would not be without difficulty, were it not for a statutable provision entirely unnoticed at the argument. To it I shall presently refer. The first three of the five grounds of appeal stated are, in substance, that the Court had not authority to make the order in question, because there was no cause pending in Court. A fifth

ground is in these terms, "because there is no law under which a deed executed by a Master would be valid in proceedings such as those in question." This order now before us is entitled, not in a cause, but "*in the matter of* the reference between William J. Fraser and Henry N. Paint." We have seen that the arbitrators directed that execution of a deed to carry out a sale directed by the award, should, when required, be made by the defendant and appellant, Paint. There was no cause and no parties before the Court in any other sense than, (the submission and award having been made a rule of the Court), that all those matters embraced by the rule of the Court, were before the Court, and had been adjudicated on, the result being the discharge of an order *nisi* that had been granted by the Court to set aside the award. That decision in effect declared judicially that the award was legal. The appellant, Paint, having neglected to execute a deed to effectuate the sale of land made by authority of the award, the order in question was, on motion, granted.

The effect of the 22nd section of Chapter 109, of the Revised Statutes, the provision referred to by me above, appears to me quite conclusive to establish the order appealed from. By that section, the Court, of which (as here) the submission is made a rule, is empowered to do *whatever may be required to carry the award into effect.* This award could not be carried into effect unless the sale required by it be made and perfected, and it was directed to be made and perfected by a party to the submission. He, when required by the Court to execute a deed conformably to the award, refused to do so. Thereupon the learned Judge in Equity, fully empowered to do so by the statute, ordered the execution to be made by a Master of the Court. His order to that effect must be confirmed with costs.

DURKEE *v.* COX ET AL.

SECTION 34 of the Insolvent Act of 1869, providing that the inspectors shall superintend and direct the assignee in the performance of his duty under the Act, &c., does not render the inspectors liable for the wrongful act of the assignee, in the absence of evidence showing that they authorized the act complained of. Costs directed to be paid out of the estate.

THIS action was brought by the plaintiff against the assignee, (who died some time after the action was brought,) and the inspectors of an insolvent estate, for the alleged wrongful sale, by the assignee, of a vessel that insolvent had been building for the plaintiff, the title to which he alleged vested in him. The evidence taken by commission was referred to the Court for decision, and the cause was argued last Term by *Weatherbe, Q. C.* and *MacCoy, Q. C.*, for plaintiff, and *Rigby, Q. C.*, for defendant.

MCDONALD, J., now (December 11th, 1877) delivered the judgment of the Court:—

Cox, who was originally one of the defendants in this cause, but is now dead, was the assignee of McGill & Co., and the other defendants were inspectors of the estate under the Insolvent Act of 1869. The assignee, as such, sold the property in question, the principal part of which was a vessel then being built by the insolvent for the plaintiff, under an agreement which, as he alleges, vested the title to the property in him; and for that sale this action is brought. A large mass of evidence was taken before a commission, and was, by agreement of the parties, submitted to this Court for judgment. Several objections were taken to the plaintiff's right to recover, assuming even that the defendants Kelly and White were parties to, and authorized the sale; but with the view that I take of the case, it is unnecessary to decide the questions so raised. The plaintiff, without giving any evidence whatever of any act or word of the defendants White and Kelly, calculated to show that they either authorized or ordered the sale of the property, relies upon sec. 34 of the Insolvent Act of 1879, which provides that the inspectors "shall superintend and direct the assignee in the performance of his duty under this Act." That section, after making other provisions not essential to this inquiry, provides that the

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directions of the inspectors shall be subject to the revision of the creditors at any meeting thereof held for that purpose.

I think that the statute referred to would not render the inspectors liable for the wrongful act of the assignee, in the absence of evidence showing that they authorized the act complained of; but, in this case, the evidence is entirely the other the other way. The defendant Kelly says, "I did not direct Cox to advertise the sale. I did not authorize the sale of the vessel, and I never, in conjunction with Mr. White, the other inspector, gave any order, verbally or in writing, to the assignee, authorizing the advertisement or sale of either the vessel or materials. I never had or exercised any possession or control of the vessel or materials, nor did I ever order any person to take possession of either." Again, Mr. White says, "I never authorized the sale of any of the personal property as inspector of the estate, either verbally or in writing, nor was I asked to do so, nor do I know that Mr. Kelly ever authorized the sale. I never had possession of any of it, nor did I ever exercise any control over it." This evidence is entirely uncontradicted, and it is impossible, in the face of it, to come to the conclusion that, because the inspectors were authorized by statute to direct the assignee in the performance of his duty, they therefore directed him to do the wrongful act complained of, assuming it to have been wongful. Judgment must be in favor of the defendant.

DESBARRES, J., read the following opinion, concurring in the judgment just pronounced:—

This case comes before us under a rule entered into between the parties in November, 1876, at Yarmouth, by which it was agreed to submit all matters in difference therein between the parties to the judgment of this Court, with full power not only to decide all questions of law involved in it, but also to draw the same inferences from the facts as a jury might, and to direct a judgment to be entered for the plaintiff for such sum as might be awarded him, and for defendants in the event of its being considered that the plaintiff was not entitled to recover. The main questions involved in this case are, 1st, whether the plaintiff was the legal owner of the unfin-

ished ship sold by Cox, since deceased, as assignee of the insolvent builders Andrew and Thomas McGill; 2ndly, whether the defendants White and Kelly, even assuming the right of property in the ship to have been in the plaintiff, are liable, as inspectors of the insolvent estate, for a conversion resulting from the sale made by Cox as assignee of that estate. It appears from the evidence produced before us, that the insolvents, on the 14th March, 1874, entered into an agreement in writing with the plaintiff to build and launch the hull of a ship for him at the River Jordan in the County of Shelburne, of the dimensions specified, on or before the 30th of November following, for which the plaintiff agreed to pay the builders $26 per ton in the following manner, viz., $2000 on the 30th June then next, the further sum of $1000 on the 31st August next, the further sum of $4000 within fourteen days after the launch of the vessel, and the residue by three approved promissory notes, to be given on the delivery of the vessel at Jordan River, payable in six, twelve and eighteen months from date. It was expressly stipulated by the builders in case they should fail or be unable to complete the ship in conformity with the agreement, that then it should be lawful for the plaintiff to enter upon and take possession of the ship which, from and after the payment of the first instalment of $2000, should be and be deemed to be the property of the plaintiff. It was contended at the argument that the plaintiff had actually paid the full amount of the first instalment within the time stipulated for payment, and had thereby become the owner of the unfinished ship, according to the terms of the agreement, and that the sale of the ship by the assignee as the property of the insolvents was a wrongful act, for which he had a right to maintain the present action. On a careful examination of the evidence, it will be found that the right of property in the ship never passed from the builders to the plaintiff, either under the agreement by payment of the first instalment, or by any transfer or delivery made by the builders to him. The plaintiff, in his deposition before the Commission at Yarmouth, stated that before the payment of the first instalment became due, he advanced $1700 to the builders, and that between May and June he arranged with

Black & Brothers for the supplies of iron that the builders might need in the construction of the ship; that it was arranged between the builders and himself that whatever supplies were furnished to them by him should be taken as cash payments; that he advanced altogether $2565, including Black & Brothers' bills, and the builders continued to work at the vessel until September, 1874, when they made an assignment under the Insolvent Act; that some time in August Andrew McGill, while standing outside of the ship and conversing with him on the subject of a letter written to Black & Brothers, said to him, "here is the ship, she is your property, you are at liberty to mortgage her or do what you like with her;" but that he took no possession of the vessel and hired none of the men, and the McGills kept at the work after that the same as before. In a statement produced by the plaintiff of payments made by him to the builders in cash and goods from time to time the amount is put down at $2025.88 instead of $2565, in which Black & Brothers' bill for $399.96 for supplies furnished, is included; but as that bill was paid by the assignee and not by the plaintiff, it must of course be deducted from the amount of plaintiff's account, and that will make the actual sum advanced by him to the builders, according to his own statement, $1625.92, being $375 less than the amount of the first instalment. It is clear, then, that the plaintiff was in no position to claim the vessel as his own under the agreement. The right of property in the vessel remained in the builders up to the time they made an assignment for the benefit of their creditors, who were entitled to the proceeds of the sale. Having failed in establishing a right of property in the ship, the plaintiff could not have recovered against Cox, had he survived. He could under no circumstances, have made the inspectors responsible for the sale of the ship, without proof of their having either directed the sale to be made, or sanctioned it after it was made, facts which both of the inspectors have positively denied under oath. I think, therefore, that our judgment must be for the defendants, and that the plaintiff must be content to make his claim against the estate of the insolvents, and take his share of the assets whatever it may be.

On December 15th, 1877, the Court, per SIR WILLIAM YOUNG, C. J., passed an order, directing the costs to be paid out of the estate.

CAMPBELL *v.* CANADA INSURANCE UNION.

DEFENDANTS issued a policy of insurance containing a condition that the plaintiff was not to use the ports of Big Glace Bay, Schooner Pond, Block-house Mines, or Bridgeport, C. B., except during June, July and August. The loss occurred in October, at a place known as 'the Port of Caledonia,' on the same coast, and about three-quarters of a mile from the workings of Big Glace Bay. The 'port of Big Glace Bay' had, at the date of application, and of the issuing of the policy, ceased to exist as a port for vessels, and the port of Caledonia, which was within the limits of the Bay, had been substituted therefor."

Held that the loss was within the risk excepted, and that the policy might reasonably be construed as if the word "in" were substituted for the word "of."

IN this cause a verdict was taken by consent for plaintiff, and brought up for the consideration of the Court by a rule *nisi* to set the verdict aside, which was argued by *Ritchie, Q. C.*, for the rule, and *J. S. D. Thompson*, contra. The argument turned almost wholly on points which the Court did not find it necessary to consider, and it is for that reason omitted.

SMITH, J., now (December 11th, 1877,) delivered the judgment of the Court:—

This action was brought by William Campbell against the Canada Insurance Union to recover the sum of $415.06, as defendants' proportion of a partial loss on the schooner *Rescue*, under a time policy issued by one George Whidden, at the time acting as the attorney of the defendants at Halifax, in relation to their business as Marine Insurers. The said schooner was insured for the period of twelve months, from the 20th day of July, 1872 to the 20th day of July, 1873. There is a condition in the policy thus issued that the plaintiff was "not to use the ports of Big Glace Bay, Schooner Pond, Block House Mines, or Bridgeport, C. B., except during June, July and August." The vessel sustained the injury which is the subject of this action, during the month of October, 1872, at a place called and known as "the port of Caledonia," in Cape Breton, on the same coast with, and, as appears by the evidence, about three-quarters of a mile from the workings of Big Glace Bay. The defendant pleaded several pleas, but the

principal question for the consideration of the Court is raised under the 5th, 6th and 7th pleas, which substantially allege that the plaintiff violated the condition referred to, by using the port of Big Glace Bay within the period precluded by the policy. In short, is the port of Caledonia, at which place the vessel was injured, embraced, by the terms of the condition, in the words, "the port of Big Glace Bay?" It is simply a question of construction, to be governed by the same rule, as laid down by Lord ELLENBOROUGH in *Robertson v. French*, 4 East., 130–135, that applies to other instruments, viz., that it is to be construed according to the sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense. distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, *and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense. Arnould*, in his work on Insurance, vol. 1, p. 262, 4th Ed., lays down a similar principle, in reference to the introduction of parol testimony to explain the terms of a policy, thus: "In order to effectuate the real intention of the parties, the Courts may resort to any means of interpreting the policy that may be supplied by the rules of the common law, the general usage of trade, or *the particular circumstances of the case.*"

Now, in seeking to arrive at the intention of the parties to this policy, and to give them effect, we must, in the light of the foregoing principles, enquire what was the nature of the risks the underwriters sought to except, and what were their precise nature, as contemplated by the plaintiff, when the policy was effected, both of the contending parties being then presumably cognizant of the actual condition of the available ports in Big Glace Bay. Beyond dispute, the place designated on the plan in evidence as "Port of Big Glace Bay," at the date of the application for and of the issuing of the policy, had ceased to exist in the character of a port for vessels. The witness Campbell says the pier was carried away in 1870 or 1871, and adds: "I don't know of any coal having been

shipped in Big Glace Bay since 1871, other than at the port of Caledonia." And Robertson says: "There is not any other landing or shipping place at Big Glace Bay but Port Caledonia." It is manifest, then, that, at the time the insurance was effected, the Port of Big Glace Bay, previously so known, had ceased to be used as a port for coaling vessels, and the port of Caledonia substituted therefor. Could it have been, we may well ask, the intention of either the plaintiff or the defendants to except from risk, under the policy, a port which had been abandoned as such, and which may be said to have ceased to exist. Is it not much more consistent to give a meaning, and an intelligent construction, to the contract, than to presume one entirely at variance with the reasonings of practical minds? One cannot but feel, on looking at the plan produced, that whatever, proportionately with what was known as the Port of Big Glace Bay, the risk of the Port of Caledonia may be, both are lying, as the witness Campbell says, on a dangerous coast in the Spring and Fall; and that it was the intention of the underwriters to except from the risks they undertook, the ports *in* Big Glace Bay, within the limits of that "dangerous coast," may be well and easily concluded, and that it was so understood by the plaintiff, must be, I think, the enevitable inference. If any other construction is given to the contract, then I am at a loss to conceive against what risk the insurers were excepting themselves within the limits of Big Glace Bay. It is true the witness Wright testifies; "we have always considered that Big Glace Bay extended from headland to headland, as I have marked on the plan;" but I can hardly suppose it will be seriously contended that such a view is sustained by the geographical position as portrayed by the plan itself. Undoubtedly Port Caledonia is within the limits of the Bay, and is so established by the proof. Whether it affords security more or less than the abandoned port of Big Glace Bay, is an element which furnishes, in my opinion, but little aid to the true construction of the contract. The only exception made by the policy to the use of any port or ports along the line of this particular coast outside of the period specified, would seem to be that of Little Glace Bay, and it only requires a cursory glance at the plan to see why it it is thus excepted.

Unlike either Port Caledonia, or what was the port of Big Glace Bay previous to its disuse, it lies protected by two points of land which form a comparative harbor, and is thereby sheltered from the violence of the spring and autumnal gales which inevitably assail the other ports, and, as is well known, such natural security has been augmented by expensive artificial works.

In view of all the facts presented by the evidence, it will be doing no violence to the language of the condition in the policy, but on the contrary will, in my opinion, be carrying out the reasonable intention of the parties, to construe the word "of" as meaning "in," and that the use of a port in Glace Bay, except in the months enumerated, relieved the insurers from liability under the policy.

It is unnecessary for me to refer to the other objections raised by Mr. Ritchie at the argument. I can only say that, after the reception of the premium by the defendants, and the adoption of the policy by their agent Mr. Mitchell, the Court would hesitate a very long time before adopting them as sound.

The rule to set aside the verdict must be made absolute, with costs.

GRAY v. THE STEEL COMPANY OF CANADA.

PLAINTIFF had been in the employ of the defendant Company under Gould, their Chief Engineer, at the rate of $5 a day, for the time he was actually engaged. On the 6th October, 1874, Tremayne, the London Secretary of the Company, wrote to Harrison, then Manager in Nova Scotia, in these terms: "It has been agreed that Gray shall receive pay from the Company as from the day of Mr. Gould's departure from the works, at $5 per day, the term of his permanent services to be fixed by the Board, when the salaries of other officers are discussed." This letter was shewn to plaintiff by a subordinate servant of the Company, but without the consent of Harrison, who swore that the whole matter had been left in his hands to deal with by the Board of Management in London. Harrison repudiated the terms contained in the letter of Tremayne, and between the 6th October, 1874 and the 4th January, 1875, by himself, and through Dudgeon, the Treasurer, wrote to plaintiff, informing him that he was to be paid only for the time that he was actually employed.

The jury found for plaintiff, allowing $5 per day for every day from August 3rd, 1874, to April 30th, 1875.

Held, by YOUNG, C. J., (with whom SMITH J. concurred), that the letter of Tremayne, not having been intended to be seen by plaintiff, did not constitute a contract with him, or if it did that it had been formally repudiated afterwards, and that the verdict must be set aside;

by WILKES, J. (with whom MCDONALD, J. concurred,) that the plaintiff having seen the letter of Tremayne without any fraud on his part, and having adopted and acted upon it, was entitled to the amount awarded by the jury.

Quære, whether, the Court being equally divided, there could be any judgment.*

SIR WM. YOUNG, C. J., now, (Dec. 11th, 1877,) read the following opinion:—

The question here is the right of the plaintiff, an engineer employed by the defendants, to recover wages at $5 a day for his whole time, which the jury have awarded him, or only for such time as he was actually employed. He was originally engaged and paid only for his actual time, as appears by his account rendered from 5th August to 26th September, 1874, by the letter from London of 6th October, 1874, (No. 2,) where it is stated that the consideration of his permanent employment would be entered into at an early date, and by the deposition of Mr. Harrison, the General Manager up to April, 1875, that the plaintiff was never employed by him upon any other terms, that is, he was to be paid for such time as he might be required. Harrison says: "whenever I required plaintiff's services I always notified him." This was after the departure of Mr. Gould, the principal engineer, who had employed and recommended the plaintiff to Harrison, and it is obvious, that no question would have arisen, but for the misconduct or carelessness of a clerk, through whom the plaintiff obtained a copy of a second letter from London, of 6th October, 1874, a confidential letter, which was not shewn to him with the consent of Harrison, and was never intended to have been shewn to him. That letter says: "It has been agreed that Gray shall receive pay from the Company as from the day of Mr. Gould's departure from the works at $5 per day, the term of his permanent service to be fixed by the Board, when the salaries of other officers are discussed." This, it was contended, is a contract; but it is difficult to maintain that position, when in fact the plaintiff should never have seen it, and had timely notice from the principal officers in charge that his claim was repu-

* The cause was afterwards, by judgment of the Court, per SIR WM. YOUNG, C. J., directed to be re-argued before the full Bench. In delivering judgment, his Lordship, on the authority of *Story*, said that such decisions as the above, where the Court was equally divided, were not generally reported. It has been deemed advisable, however, to print the opinions, for the convenience of the Court and Counsel on the re-argument of the cause; and for the further reason that in such cases the Court, in the final decision of the cause, frequently simply adopts one or other of the opinions delivered after the first argument.

diated. Harrison says that up to April, 1875, when Mr. McKay succeeded him, he had the sole control, and had instructions from the London Board of 26th December, 1874, whereby the whole matter with the plaintiff was left in his hands to deal with. Three of the letters shew unmistakably the feeling and intentions of the officers in charge. On the 23rd November, 1874, Harrison requires from the plaintiff a statement of the number of days he had been employed in the Company's works, and that a similar report and statement should be sent in at the end of each month. On the 29th December, 1874, Mr. Dudgeon, the Treasurer, by Harrison's directions, writes to the plaintiff in these words: "I have to refer you to our letter dated 9th November, in which you are informed that our Company can only pay you for those days you work for us. I am also desired by the Board to inform you that you can only claim for time given to the Company's affairs, and that you must furnish a monthly statement of such time, and the amount due to you, to enable the Treasurer to settle with you once a month."

This was addressed to the plaintiff at Halifax, where he resided, with an intimation that he was not to consider himself as independent of control of the management. Then there is a letter from Dudgeon to the plaintiff, of 4th January, 1875, wherein he says: "Your having read and copied Tremayne's letter of 6th October, you have fallen into an erroneous idea, in fancying you were retained by our Company permanently. The letter was addressed to the head office, and was intended for that office alone, and so when mentioning the word "retained," it signifies for work on hand. You will will please to take notice that you are not retained by our Company unless we have work for you to do, and that you are, and always were, free to accept any professional employment that may be offered to you by any other Company or individual."

It appears to me that the fact of the plaintiff residing, not at the mines, where a continuous salary would have been an indispensible condition of his remaining, but at Halifax, where he was open to other employment, has not been sufficiently considered. The letters are inconsistent with the notion of a continuous or permanent salary. But conceding

that in October, 1874, such a salary was conferred for an indefinite period, at the rate of $5 for every day, surely the Company could repudiate and revoke it, as they did by the letters of 29th December, 1874 and 4th January, 1875, to which no reply was in proof. And yet in the face of these formal notices from the Manager, duly authorized, the Jury have awarded the plaintiff $5 per day, as claimed, from Aug. 3rd, 1874 to April 30th, 1875. This, in my view, cannot be sustained, and $200 having been paid into Court, the rule for a new trial should pass.

McDONALD, J.—The letter of Mr. Tremayne, dated 6th of October, 1874, may not have been intended to be read by the plaintiff, as it contained an implied reflection upon the agent for giving him notice to leave contrary to the wish of the Board, who preferred him to some one whom the agent appeared anxious to take in his place; but it was clearly intended that Mr. Gray should know that, as that letter stated, it had been agreed that he should receive pay from the Company from the day of Mr. Gould's departure from the works at five dollars per day. He was put in possession of that information by one of the servants of the Company, without any fraud on his part, and he afterwards acted on the proposal in good faith. The agent, instead of carrying out the instructions of the Board to pay the plaintiff as agreed upon, undertook, without any authority whatever, to add to those instructions the absurd restriction that the pay should be for as many days only as the plaintiff should be actually at work.

That the plaintiff, or any other competent engineer such as he is proved to be, should agree to be under the control of the Company at all times and render his services whenever required, at five dollars per day for only such time as the Company would think fit to keep him actually employed, though the number of days should not be one in a year, is something that I find it impossible to believe, particularly when we have the fact that he was the choice of the Company, and that his predecessor, who himself received forty dollars per day, highly recommended him for the position. I can find no authority to an agent to limit the instructions of his principals, as was here attempted. The ingenuity of Mr.

Dudgeon, who defines the word "retained" as it is used by Tremayne, to signify "retained for work on hand," when there is nothing to support such a distortion of the plain meaning, is in keeping with the conduct of the agent throughout in dealing with the plaintiff,—conduct at once uncandid and unfair. I entertain no doubt that Mr. Tremayne's subsequent letter of the 29th of December, 1874, would justify the manager in settling with the plaintiff and removing him from his position, but neither the one nor the other was done, as that letter authorized, before the expiration of the time for which the plaintiff charges in his particulars of demand, and therefore his right to the wages fixed by the letter of the 6th of October, in my opinion, remains unquestionable. I think that that letter, when proved and tendered in evidence, could not be rejected, and it being proper evidence, and the plaintiff having acted on it in good faith, I cannot see how the verdict can be disturbed. His having rendered an erroneous account, which did not induce the defendants to change their position to their disadvantage cannot, in my opinion, lessen the rights of the plaintiff or the obligation of the defendants.

SMITH, J., concurred in the opinion of the Chief Justice.

WILKINS, J.—The verdict in this case is perfectly satisfactory to me who tried the cause, and I think if the case be thoroughly understood, it can scarcely fail to carry to other minds the conviction which it has induced in mine. The first point of inquiry that I shall notice is the letter from Tremayne, the London Secretary, to Harrison, then the Manager in Nova Scotia. I put it to the Jury as evidence, and strong evidence, and I am convinced that it was, in its legal character, such. A knowledge of its contents was obtained by the plaintiff without fraud, and with perfect honesty. If a disclosure of those contents was improperly made by any subordinate servant in the office, that is perfectly immaterial, as regards the plaintiff, or as regards the effect of the letter as evidence. In the whole scope of the testimony before us respecting it there is not one word to indicate or to warrant the slightest inference that when the letter was written and transmitted to this country, the English authorities of the Company who wrote it, by their Secretary, had not then *absolutely decided on the*

subject matter of it concerning plaintiff's service and remuneration therefor, or that there was any, the slightest, reserve on these points by the Company. It conveyed to the Manager Harrison, (if confidentially as between his principals and him is nothing to our purpose,) an absolute decision of the authorities for the benefit of the plaintiff in respect of his services then performing for the Company. The effect of it is precisely what the effect of evidence would have been, if given *orally* in Court by Tremayne who wrote it. Had he been put in the witness box at the trial, he, having written the letter, would necessarily have sworn in terms of the letter, thus:— "On the 6th October, 1874, the Board, noticing that Harrison had notified this plaintiff to quit, declared to me that, nevertheless, it had always intended to retain his services, and directed me to write to Harrison to cancel the notice he had given, and to inform him (the plaintiff) that it had been agreed by the Board that he should receive pay from the Company *as from the day of Mr. Gould's departure from the works, at five dollars per day;* and directed me further to inform Harrison, that the terms of his (the plaintiff's) *permanent* service would be fixed by the Board when the salaries of other officers should be discussed." There is no evidence to show that the Board receded from the decision in the letter. (His Lordship here read the extract from the letter.) Had Tremayne,—the author of the letter—being in the box, been asked; "had you instructions from the Board when they so communicated with you, to direct Harrison not to make known to plaintiff what was so communicated to you?" it is certain he must have answered 'No.' Why? Because Harrison *did not venture to say he had received any such instruction.* His strongest language is what comes very far short of that. He says on cross-examination, "it was not intended to be shewn to plaintiff." Intended by whom? Perhaps by himself alone! "It was not shewn to him *with my consent.*" Of that I am persuaded; but it is nothing to the purpose. Again he said; "Plaintiff had no right to see those letters." Such was, no doubt, his opinion, but that is foreign to the subject of our enquiry. The point is, as plaintiff did see it, and honestly,—"had Harrison, who was a mere agent, instructions from his principals *not to shew it to plaintiff*?" He

keeps entirely clear of *that!* He does'nt venture to convey the slightest intimation to that effect. *But, where is the evidence to shew that the Company intended that the letter should not be seen by the plaintiff?* There is internal evidence that they did not design to conceal it from him. Of that I am persuaded, and so thought the jury. We know that if on a criminal trial, a privileged witness, choosing to waive his privilege, testifies to a fact, the fact is evidence and may suffice to convict a prisoner at the bar. This plaintiff was permitted by the Company,—for the servant's act was its act,—to see in writing an absolute stipulation made by the Company whom he served, in his favour; he assented to the stipulation, became a party to it by adoption of it, gave his services to the other contracting party, brought his action for compensation at the stipulated rate named by the other party, recovered a verdict. That verdict, in my opinion, he is entitled to retain. But here is a view of the question that appears to my mind quite decisive of it. If it were a fact that it was not designed by the Board, by whose authority it was written and sent out to the office here, that the letter should be seen by the plaintiff, that fact could easily have been proved by the defendant Company. Not having been proved, and plaintiff having got a verdict, we are bound to conclude *that it was not a fact.* The letter in question, possibly, may not be evidence, but if it be not such, I should like to hear some authority in case or principle that shews it to have been under the circumstances legally inadmissible.

The effect of the letter noticed is so decisive upon this case that I feel it unnecessary to observe upon subordinate points, which, but for the letter, would be very significant. Harrison expressly says that Dudgeon wrote by the authority of him, the agent. When Dudgeon addressed to plaintiff his letter of the 29th December, 1874, he begins by referring to a letter, "our letter of the 9th of November, wherein you (plaintiff) are informed that our Company can only pay you for those days you work for us." It would have been very satisfactory to have seen the letter thus referred to; but no evidence of it was produced. According, however, to the Company's version of the nature of the contract existing between the parties after the 9th November, how is it that plaintiff, then, as they say,

compensated *by the day*, is shown to have been called on as entirely and always at the command of the manager, and even for a professional opinion as an engineer? Here is a communication to plaintiff from Dudgeon dated 21st November, 1874:—

"SIR,—Will you please inform the Company in London more fully on the subject of coke obtained from local coal, as the information at present received is not sufficient."

Was this to be done and paid for as day's work, or work to be done as a skilled and *retained* engineer? So with regard to a communication to him dated December 1st, 1874:—"Can you inform us what nine inch horse tramway the Board wish us to contract? Telegraph—Steel Company of Canada."

Dudgeon concludes his letter of the 29th December, 1874, just noticed, with these words,—addressed to a man who was told in the first part of the letter that he was to consider himself entitled to be paid *for the days he worked for them*;—"You are not to consider yourself as independent of the control of the management." Even Harrison says, "I made no direct bargain with him. He was engaged to do general work of an engineer," (not a word of day's work,) "when required." He said, "Gould, the former manager, recommended the plaintiff to me as a useful man." I believe he proved himself such, and that the decision shewn to have been arrived at by the Board respecting the value of his services and the rate of compensation for them, was merited by his conduct, and that he cannot without injustice be deprived of the benefit of this verdict. I don't think it necessary to apply a very large amount of discernment to the evidence to discover that the same sentiments towards the plaintiff were not entertained by the London Board and by Mr. Harrison. That difference may, perhaps, account for the statement of the latter, "that the letter in question was not shewn to plaintiff *with my consent*." I am of opinion that the rule should be discharged. If the verdict is wrong, the setting it aside will not, of course, be a mere case of the exercise of discretion by this Court, but a case of misdirection.

McDonald, Q. C.—As the Court is equally divided I presume that the verdict will stand.

SIR WILLIAM YOUNG, C. J.—Not in this Court. There can be no judgment.

McDonald, Q. C.—There should be a re-argument, as in the case of *Graham v. Graham* last term, in which the Court was equally divided.

YOUNG, C. J.—The present practice is that there can be be no judgment. I do not approve of the rule, and we will reserve the point to give the Counsel on both sides an opportunity to cite authorities.

IN RE ASSESSMENT OF THE BANK OF NOVA SCOTIA BY THE TOWN OF NEW GLASGOW

THE act of incorporating the town of New Glasgow, in Sec. 46, provided that the Corporation should assess, collect and pay over whatever moneys were required for poor rates, and all other except school rates, and should have within the town all the powers relating thereto vested in the Sessions, Grand Jury, and Town Meetings, &c. The 52nd Section empowered the Town Council to make bye-laws and rules touching all matters within their authority, including rules for regulating the mode of assessment and levying the same, which bye-laws when approved by the Governor in Council should have the force of law. The bye-laws so made defined 'personal property for the purposes of assessment so as to comprehend all goods and chattels, and provided for the trial of appeals from the assessment. They contained a further provision that the roll when finally passed should be valid, and bind all parties concerned, notwithstanding any defect or error committed in or in regard to it. The Bank of Nova Scotia doing business at New Glasgow through a branch, appealed from its assessment, and the appeal having been heard in the mode provided by the bye-laws, the assessment was confirmed, and a warrant issued, in pursuance of which a levy was made on books of account of the Bank, and on a number of promissory notes the property of the Bank. The Bank having thereupon brought the assessment and warrant up by certiorari;

Held that Sec. 67 of Cap. 21, R. S., did not apply to the case, being confined *ex nomine* to proceedings of the Sessions, that the levy on promissory notes was good, that the provision of the bye-laws making the assessment final and binding, notwithstanding defects or errors, did not prevent the Court from reviewing it under writ of certiorari, and that the certiorari would lie in such a case if the affidavit disclosed sufficient grounds, the scope of the writ being wider here than in England.

The Court, after ruling as above, quashed the certiorari, without costs, sufficient grounds not having been shown for setting aside the assessment.

In this cause *Rigby, Q. C.*, having on a previous day obtained a rule *nisi* to quash a writ of certiorari taken out by the Bank of Nova Scotia to bring up the assessment, now, (Feb. 24th, 1877,) moved to make the rule absolute. The grounds on which the writ was attacked appear in the argument of counsel.

The writ was granted on the following affidavit:—

HALIFAX, SS.

IN THE SUPREME COURT.

I, James Carmichael, of New Glasgow, in the County of Pictou, merchant, make oath and say as follows:—

(1.) First, I say that I am the agent at New Glasgow of the Bank of Nova Scotia, a body corporate under an Act of the Legislature of the Province of Nova Scotia, and as such agent, have in my possession and under my control, and am responsible for certain moneys and books of account, the property of the said Bank, and certain accounts of the said Bank hereinafter referred to.

(2.) Secondly, that a levy has been made at New Glasgow, aforesaid, on the books of account connected with the agency of said Bank of Nova Scotia, and on a large number of promissory notes, the property of the said Bank, all the said property being at New Glasgow, aforesaid, and the said property is detained under said levy, and a sale thereof has been threatened by the person who also made the said levy.

(3.) Thirdly, that the said levy has been made by one Duncan R. Cumming, who professes to be acting in obedience to a warrant issued by John McKay, a Stipendiary Magistrate, and the said warrant, it is alleged, was issued against the said Bank of Nova Scotia to enforce payment of a large sum of money alleged to be due by the said bank for town, county and poor rates, to the town of New Glasgow aforesaid.

(4.) Fourthly, that the assessment on which the said warrant and levy are alleged to be based, is irregular, illegal and defective, as I am advised and verily believe; and the same has been made on property which, as I am advised and verily believe, is not liable to assessment; and the said warrant is, as I am advised and verily believe, also irregular and defective; and the said levy is also, as I am advised and verily believe, illegal, and has been made on goods and property which are not liable to be levied on, and property which is not the property of the Bank of Nova Scotia.

(Sgd.) JAMES CARMICHAEL.

Sworn to at New Glasgow, in the County of Pictou, this 9th day of January, A. D., 1876, before me,
(Sgd.) JAMES A. FRASER,
Com'r in the Supreme Court, Co. of Pictou.

Rigby, Q. C., in support of the rule:—

The writ was improvidently granted. The affidavit on which it was granted merely sets out that the deponent is advised and believes that the assessment was illegal, setting out no facts to shew that it was illegal. *Parker v. Bristol Railway Company*, 6 Exch., 184; *8 A. & E., 413; 5 L. R. Q. B.*, 466. There is no affidavit disclosing merits.

The application for this writ of certiorari is too late; R. S. cap. 21, sec. 67, p. 123. That section applies to the town of New Glasgow; Acts of 1875, Ch. 49; and it provides that no certiorari shall issue to remove rates, &c., except on motion on the first day of the next term of the Supreme Court in the County. There was a term of the Supreme Court in the County after the appeal from this assessment before this writ was granted.

The writ is granted by a commissioner of the Supreme Court in Halifax County, to bring papers from Pictou County. There is no jurisdiction for that. *Hilliard, N. T.*, 696.

Thompson shews cause.—The certiorari here brings up for review the warrant for the collection of the rate and the proceedings under it. The affidavit on which the certiorari was issued sets out that the warrant was issued by a person who was not authorized by the law to issue it, and that a levy was made upon property not liable to levy. The affidavit on which the warrant to collect the rate was issued, was made under sec. 48 of ch. 21, R. S., whereas it should have been under ch. 49 of the Acts of 1875. It does not even comply with the requirements of ch. 21, sec. 48, not being signed by the constable making it, and it does not say that notices were served or mailed. *2 Ch. Arch. Pr.*, 1620.

The warrant does not follow the by-laws of the town of New Glasgow, or the statute of incorporation. It is defective in form, and is not issued by the proper party; ch. 49, Acts of 1875, sec. 68.

It was not competent under this warrant to levy on promissory notes; *Byles on Bills*, 3 and 177. Our statute, p. 486, R. S., modifying the common law principle, applies only to executions. R. S., ch. 21, sec. 15 and sec. 88, give banking corporations the right to state the amount of their assessable property, of which we have been deprived.

The by-laws of the town under which these proceedings were taken, if not taken under the Statute of County Assessments, are *ultra vires*.

The clause restricting the time for issuing a certiorari does not apply, because the proceedings are not taken under the Assessment Act cited. Besides, the certiorari is taken not merely to bring up the rate, but the warrant and proceedings under it.

Cites R. S., 4th ser., ch. 94, sec. 57 and 58, as to the power of the Court and of Commissioners in regard to certiorari; also, Ch. 1 of the Acts of 1874, in the *addenda* to R. S., 4th series.

Rigby, Q. C., in reply.—If the Bank agent wished to attack the assessment by this certiorari, he should have shewn in his affidavit what assessable property the Bank has.

SIR W. YOUNG, C. J., now, (December 11th, 1877), delivered the judgment of the Court:—

The defendants having been incorporated by the Acts of 1875, Chap. 49, it was provided by section 46, that they should assess, collect and pay whatever monies should be required for poor rates, and all other rates and taxes, except school rates, fees, monies and assessments, and should have within the town all the powers relating thereto vested in the Sessions, Grand Jury and Town meeting, and should exercise within the district all the powers and authority previously exercised by the Sessions, Grand Jury, and Town meetings of all kinds, except school meetings. Similar clauses are to be found in the acts incorporating Dartmouth and Truro, investing these municipalities with large and uncontrolled authorities, some of which I cannot help thinking, and especially the right of taxation, might be wisely subjected to some revision by an independent tribunal. The 52nd section of the New Glasgow Act empowers the Town Council to make, and from time to time to alter and repeal by-laws and rules touching all matters within their authority, including rules for regulating the mode of assessment and levying the same, which by-laws and rules, when approved by the Governor in Council, shall have the force of law. The by-laws so made, and as I presume, approved, define what the term personal property and personal estate

shall be held to include, differing somewhat from the definition in the County Assessment Act, and comprehending all goods and chattels, and provide that appeals from the assessment roll shall be tried by a Court, to be composed of three members of the Council and the Stipendary Magistrate, which roll, when finally passed by the Court, and certified by the Clerk as so passed, shall be valid, and shall bind all parties concerned, notwithstanding any defect or error committed in, or in regard to said roll. This is analagous to the 61st section of the County Assessment Act, R. S., ch. 21, and the 29th section of the Poor Act, ch. 33, the former declaring that the Sessions shall finally determine appeals as they shall see fit, and the latter in like manner declaring that the order of the Sessions on appeal shall be final. We have a reported case, however, *Barnaby v. Gardiner*, James, 307, in which the Court said; "Many of the statutes enact that proceedings in inferior courts shall be final, but that does not take away the jurisdiction of the Supreme Court to review their proceedings under writ of certiorari." This is a very significant *dictum* which has never come up for argument, and was not at all referred to in the argument of this case.

In the year 1876 the branch of the Bank of Nova Scotia at New Glasgow was assessed in the sum of $25,000 on their personal property, which was affirmed on appeal, and a general warrant issued and levied on the books of account connected with the agency of the Bank, and on a large number of promissory notes the property of the said Bank, whereupon a writ of certiorari was allowed on security and a rule *nisi* was granted to set the certiorari aside on various grounds.

It was urged that the writ under the 67th section of ch. 21, could not be taken out after the first week of the then next term of the Supreme Court at Pictou, but this I think applies, as it is confined *eo nomine*, to proceedings of the Sessions touching rates.

Next, it was said that a levy on promissory notes was illegal, and it certainly may be in the highest degree inconvenient and mischievous. But in the face of our own Practice Act, Sec. 271, and of the decisions cited in *Byles on Bills*, fol.

3, this cannot be successfully contended, and promissory notes must be taken as included under the words, goods, chattels, and property.

The main contention, however, was that the certiorari was improvidently issued, and in such a case would not lie, and two modern cases were relied on from *6 Exch.*, 184, and *5 L. R, Q. B.*, 466. Now we have held in numerous cases, including *Crawley v. Anderson*,* in 1869, that the legislation and practice in this Province give a wider scope to the writ of certiorari than it has ever had in England. There it does not usually lie after judgment and some restraints are imposed upon it in point of time and amount. Here it is of familiar use, addressed to Justices of the Peace and others after judgment, and for small sums, and is sustained by the Court where sufficient grounds are laid. In *the Queen v. Coles*, 8 Q, B., 78, it was said that a certiorari does not lie to remove any other than judicial acts. This appears to be the English rule; but we have not so restricted it in this Province. In the case *Ex parte Jacob*, 3 Allen's N. B. R., 679, the English authorities are reviewed, and a certiorari to remove the proceedings of Trustees of Schools was upheld as a wholesome

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* The following is the Case referred to:—

CRAWLEY v. ANDERSON.

No Certiorari should issue in a civil suit without an affidavit showing sufficient grounds therefor in the estimation of the Court or Judge who grants it, and which may be controverted on other affidavits and motion to set the Certiorari aside. The affidavits for the Writ should not be entitled in the cause. The affidavits after the cause is brought up must be so entitled. The Writ of Certiorari has a wider scope in this country than in England, and is often issued after Judgment and for small sums, but should not be issued when the statutable right of appeal has not been lost or defeated. It is not so restricted in this country as not to remove any other than judicial acts. Sufficient bail must be given to respond the judgment to be finally given in the cause, and if the Commissioner has any doubt as to the sufficiency of the bail, he should require them to justify. —The concluding clause of Section 24, Chapter 75, R. S., (3rd Srs.) does not take away the jurisdiction of this Court. Barnaby *et al*, vs. Gardiner *et al*, *James' Reports, 306, affirmed.*

Sir William Young, C. J., now (Dec. 31, 1866) delivered the judgment of the Court.

This suit was brought for seaman's wages, under the Revised Statutes, chap. 75, sec. 24, and judgment given by the Stipendiary Magistrate therein for the plaintiff. The defendant thereupon brought the cause up by *certiorari*, and plaintiff's Counsel obtained a rule *nisi* to set it aside. This has been argued before us, and in determining the case we shall take the opportunity of settling several points of practice.

First—Although no affidavit is required by the Revised Statutes, chap. 148, we hold that no *certiorari* should issue in a civil suit, arresting its progress or staying execution, without an affidavit showing sufficient grounds in the estimation of the Judge or Court who grants it, and which may be controverted on other affidavits and motion to set the *certiorari* aside.—The affidavits for the writ should not be entitled in the cause; (Ch. Arch. Q. B. Prac., 12th

jurisdiction. Other cases to the same effect are collected in *Stevens' Digest*, 89, 90.

The two cases already referred to, cited by Mr. Rigby do not apply. *In Parker v. The Bristol Railway Co'y*, 6 Exch., 184, the writ was quashed upon the ground that the case had not been sufficiently disclosed to enable the Judge to exercise his discretion. In the *Queen v. The Justices of Surrey, 5 L. R., Q. B.*, 466, it was held that though a certorari is a discretionary writ and not of course, under the particular circumstances, the applicant having a peculiar grievance was entitled to the writ *ex debito justitiae*. In *Reg. v. Chatrell*, 33 L. T. R., 305, the writ, directed to Justices, was superseded, only on the ground that the Act for Prevention of Cruelty to Animals had absolutely prohibited it. "Were the case *res integra*, said Baron FIELD, we would be much inclined to hold that the writ should issue," and he quotes a dictum of ERLE, C. J., that the restoration of the use of the certiorari would be a salutary addition to the laws. In the *Colonial Bank of Australia v. Williams*, 30 L. T. R., 257, the Privy Council held that the Supreme Court of a colony has a general power to issue a certiorari to to any Court in the colony, co-extensive with the like power of

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edition, 1224; *Ex parte Nobis* 1 R. & Cr., 267.) The affidavits after the cause is brought up must be so entitled; (*Ch. Arch. Q. B. Prac, 1223*; *Frank vs. Wicks*, 9 Dowl, 499; *Perrin vs. West*, 3 A. & E. 406; *The Queen vs. The City of Halifax*, Trinity Term, 1864 in this Court.

Second—It appears from *Ch. Arch, Q. B. Prac. 1221*, and from *3 Dowl 90*, and other cases that a *certiorari* lies as of course in all cases before judgment, with certain exceptions, not applying to our Courts. After judgment it does not usually lie and some restraints are imposed upon it in point of time and amount. In this Province we have given a wider scope to the writ, and it is of familiar use addressed to Justices of the Peace and others after judgment and for small sums. It ought not to issue, however, where the statutable right of appeal had not been lost or defeated.

Third—It was said in *The Queen vs. Coles*, 8 Q. B. 78, that a *certiorari* does not lie to remove any other than judicial acts. This appears to be the English Rule, but we have not so restricted it in this country.

Fourth—Our Act requires sufficient bail to respond the judgment to be finally given in the cause, and the Commissioner should take care that they are so, and if he have doubts he should require them to justify.

Another question arises in this case out of the concluding phrase of *Sec. 24, Chap. 75* of the *Revised Statutes* "that the award of the Justices shall be final and conclusive." So also in the 29th *Section of Chap. 89 R. S.*, it is said that the order of the Court of Appeal shall be final. These expressions, however, strong as they are, we do not hold as wresting this Court of its jurisdiction, (*James' Reports 397*,) and they do not apply where the rules of natural justice have been plainly violated, as if a party were condemned on insufficient notice or without being heard at all. But the grounds must be clear and obvious. The Legislature has entrusted two Justices or the Stipendiary Magistrate in their room with power to hear and determine the evidence, and to pronounce upon the merits without appeal. In *England*,

the English Queen's Bench, but which this Court, as I have already said, has carried still further.

It is abundantly clear, then, that this writ would lie upon sufficient grounds; but the question is, does the affidavit on which it was granted disclose such grounds. The Branch Bank at New Glasgow, having some property and doing business there, would not hope for an entire exemption from assessment. It may be excessive, but that we have no means of determining, and if we had, as the Act and by-laws are framed, we have no power to diminish it. The by-laws do not, like our city charter, include the net profits or income of the Bank, of which the Appeal Court, when sustaining a tax exceeding $500, may have had some idea. The addition of ten per cent. for non-payment they have borrowed from the City Charter of 1864, which always appeared to me too heavy, and was reduced by the Act of 1874 to two-and-a-half per cent., a fact to which the attention of the Governor in Council, when approving the by-laws, had probably not been turned. No argument was addressed to us upon this point, but as the ten per cent. was added to the assessment, and the plaintiff's right to a certiorari has been upheld in point of law, I think that the rule should be made absolute, without costs.

Parliament has gone further, when the Justices were men of education and standing, for by the *London Police Act, 2 Will 4, Chap. 79, Sec. 46.* it is enacted that their "orders shall be final and conclusive to all intents and purposes, and shall not be removable by *certiorari*, or otherwise into any Court whatsoever." Our section is founded upon, though differing in some essential particulars from, the *Merchant Seamen's Consolidating Act, 7 & 8 Vic. Chap. 112, Sec. 15,* which is itself founded on the *5 & 6 Will. 4, Chap. 9, Sec. 15.* This last section was reviewed in the case of *The Edwin,* 3 Hagg. Adm'y. Rep. 364, where SIR JOHN NICHOLL overruled a protest to a suit for wages under £20, although the seaman had summoned the master to the *Thames Police Office,* and the Magistrate had dismissed the master, pronouncing the balance to have been forfeited. "It was the object of the Legislature," said the Judge, "in passing *5 & 6 Will. 4, Chap. 19,* to assist mariners in a speedy recovery of their wages, and for that purpose to give to Magistrates a summary jurisdiction when the question of wages was merely in dispute; but it was not, I apprehend, intended to enable them to decide upon intricate questions of forfeiture, whether arising from imputed desertion, disobedience of orders, or from any other cause."

In the case before us the affidavit for the *certiorari* was entitled in the cause, which is a fatal defect in point of form. We would have regretted this had there appeared to be merits, and had the short service been unexplained. But it appears by the Minutes and affidavit of *Mr. Shiels,* and by the affidavit of *Mr. Archibald Sutherland* the Plaintiff's Attorney, that the Defendant admitted the amount claimed to be due, and alleged as his only reason for not paying it that the Plaintiff refused to sign the discharge on the back of the articles, which would have embarrassed him in recovering damages for an alleged assault and ill-usage. The defence has now assumed a different shape, which has all the appearance of being an after-thought.

Our judgment, therefore, is in favor of the Plaintiff for the amount awarded below with costs.

IN RE HUTCHINSON, INSOLVENT.

THE Insolvent, having entirely disregarded the provisions of the Insolvent Act, as to keeping proper books of account, had no means of knowing his actual financial condition, and being refused accommodation by parties from whom he had been accustomed to receive it, gave them preferential security for their existing and future advances, the result of which was that the goods purchased from other creditors, and not paid for, were levied on for the exclusive benefit of the creditors so preferred.

The Judge of Insolvency having granted a discharge suspending its operation for one year, his decision was appealed from and reversed.

Costs directed to be be paid out of the estate.

THIS was an appeal from a decree of the Judge of Probate for the County of Yarmouth, granting a discharge under the Insolvent Act of 1869.

Graham takes preliminary objection that there is no order for appeal, and that the bond is not in accordance with the practice of the Probate Court.

Meagher, for appellants, creditors:—The decree here does follow the judgment.

The insolvent did not, ror a number of years, keep a cash-book. (Sec 57, Insolvent Act of 1875). The insolvent was guilty of fraud and fraudulent preferences, within the meaning of the Act, in giving judgments to particular creditors; (Sec. 2 Ins. Act, '75, sub-sec. *f*; Sec. 3, sub-sec. *d*, *e*, and *g*), That the mortgage given by insolvent to one of his creditors, was given as a fraudulent preference, is evident from the clause in it which allows the mortgagee to enter the moment any other creditor presses a claim. These are grounds, not for the suspension of a discharge, but for an absolute refusal, under Sec. 56 of the Act.

Cites decision in case of *Harvey vs. Wylde*, (unreported); *6 Man. & Gr.*, 895; *2 El. & Bl.*, 35; *Edgar & Chrysler's Ins. Act of 1875*, p. 48 and following pages; *Bump on Fraudulent Conveyances*, 385, 66, 80, 86 and 85; *Kerr on Fraud and Mistake*, 282; *3 L. R. Eq.*, 463.

The test of what constitutes a proper set of books is that it will enable a competent book-keeper to learn from them the state of insolvent's affairs. The insolvent here increased his indebtedness to several creditors to the amount of between two and three thousand dollars, without anything to show it appearing in his books.

Thompson, (with whom was *Graham*,) contra:—Under the 132nd and 133rd Sec. of the Act of 1875, the onus of proving fraud here rests upon the opposing creditors, as the alleged preferences were made more than thirty days before the assignment. In *28 U. C., Q. B.*, 570, a doctrine is laid down which covers the case of preference. It was through the giving of this security that Hutchinson was enabled to carry on business, getting additional credit from the creditors getting the security. The mere fact of a preference having been given does not raise a presumption of fraud. A fraudulent preference is one made with the intent to give a preference, in contemplation, either by the debtor or creditors, of bankruptcy. There is no proof here of anything of that kind. The insolvent denies that these preferences were given in contemplation of insolvency, and he is uncontradicted. *29 U. C., Q. B.*, 313.

McDONALD, J.—You would contend that stronger evidence is required here than would be required in an action against the preferred creditors to recover money paid under the security?

Thompson.—Yes. Here it is a question of imposing a penalty on the insolvent. Money paid or goods sold by the insolvent within thirty days of his bankruptcy may be recovered by the assignee; but it surely would not be held, because the insolvent had undoubtedly contravened the Act in making such payments or selling such goods, that he should on that ground, be refused his discharge. *McMahon's Insolvent Act of 1875*, 194 and 195. Section 137 of the Act goes far to show how positive must be the proof of fraud. *McMahon*, 199.

Meagher, in reply.—It is a test of fraud or fraudulent preference, that it would subject the estate to compulsory liquidation.

The evidence of the insolvent himself shews that he did not keep a cash book at all until a year before his failure, and he says he does not know, and no entry on his cash book shews either the receipt or disbursement of $1,200, admitted by him to have been received the very summer he became bankrupt. At the time he gave the preferential judgments he owed eight or nine thousand dollars to other persons for goods bought during the previous year. At the very time of giving the

judgment to Ryerson, Moses & Co., for $6000, the insolvent only owed them some two thousand dollars. Cites *25 U. C. Q. B.*, 219.

It is not the intention with which books are not kept, but the mere fact, that prevents a discharge. *Wotherspoon's Ins. Act of 1875*, 110; *2 De G., McN. & G.*, 263, 293; *6 Id.*, 757; *Fisher's Dig.*, 1014; *5 L. T. N. S.*, 105; *9 Id.* 672.

WILKINS, J., now, (December 11th, 1877), delivered the judgment of the Court:—

The learned Judge in Insolvency for the County of Yarmouth, whose decree in this matter has been appealed to this Court, declared his opinion that nothing had been proved to induce a belief that the insolvent in the course of his business transactions had been at all guilty of fraud, fraudulent preference, or concealment, or other conduct in the carrying on of his business, within the meaning of the Insolvent Acts, sufficient to justify the withholding from him of the benefit of the said Acts. I regret to say that I do not so read the laws referred to, or the evidence referred to in connection with them. On the contrary, after having considered both these subjects of investigation, I have been brought to a conclusion of mind directly opposed to that at which the learned Judge arrived. It appears to me that if a trader can with immunity and impunity conduct his business as this insolvent is proved to have done, both positively and negatively, the provisions of the Insolvent Act are a dead letter, and had better be expunged from the statute-book. If such a person, when from recklessness and utter remissness in keeping his books and accounts, he is utterly ignorant of what his real financial condition is at a given period, can purchase stock without any reasonable ground of assurance that he will be able to pay for it, and, when refused accustomed accommodation from him on whom he had relied for such, except on condition of his giving, preferentially, security for present indebtedness, and *future advances* to that person, gives such security, of which the almost immediate result, which could not but have been foreseen is, that that very unpaid for stock is levied on by a Sheriff and sold for the exclusive benefit of the person so preferred and secured; if this can be done, and it can be judicially held that the laws made in the matter of insolvency to protect fair

and honest creditors, have not been violated by such a proceeding, I am unable to recognize the usefulness of the legislation. That *that* very course of conduct was pursued by this insolvent, when he secured by judgments and mortgage, respectively, as proved, the firm of Moses, Ryerson & Co., and Andrew Lovett, at the expense, and in fraud of, Doull & Miller and other creditors, is indisputable. This will appear abundantly proved, if reference be made to the following lines of the reported testimony, and the connected passages:

(His Lordship here read from the testimony of the insolvent the following passages:—"I kept no regular account with myself,—once commenced it, but it was discontinued on account of keeping the business and house items separate. Owed Ryerson, Moses & Co., on the 1st of January, 1874, $168.49, on the 20th April the same year the balance was, I think, $432.72. There was a household account. This appears by my ledger on June 22nd, 1874. I owed them $700 in all and for previous indorsements. Am not aware that I owed them more than the $700. Had an account against them at that time of $96.52. At that time the amount I owed them would be $700, less $96.52. About that time I gave them a judgment and a chattel mortgage,—the judgment, I think, about two months previously. The chattel mortgage was given about the 22nd June, 1874. * * * * * * Ryerson, Moses & Co. endorsed for me previous to the judgment, about two years. Occasionally they were on my notes,—at the time of the judgment $1,800 or $2,000. I admit having made in my previous examination, a statement that I did not, when I gave the confession of judgment to Ryerson, Moses & Co., owe them for indorsements, and have since found that in making such statement, I was in error. * * * * * The banking business was then done by Eakins, and I could not tell what they had advanced at that time. Any money that I myself borrowed from them, I invariably returned,—cannot tell or say positively what he may have returned, there being nothing on my books to show. * * * * I had great difficulty in meeting demands upon me,—was able to meet my liabilities at that time as conditions required them." Mr. Pelton asks, "Was there not a large amount of overdue liabilities which you could not meet at the time of giving the judgment to Ryerson, Moses &

Co."? Answer: "There was a large amount which I could not have met without the usual accommodation. What I call the usual accommodation is when the banks are discounting freely. I had always been able to get any accommodation my business required,—was at this time able to get the accommodation required. At the time the judgment was given there were a large number of liabilities for stock-in-trade, which had already been extended beyond the usual time, but upon which I expected to get the usual accommodation. * * * * Did not know that I was in failing circumstances at the time that I gave the judgment to Ryerson, Moses & Co.; cannot remember a single circumstance of being called upon at that time in respect to which I was unable to meet the demand in the usual manner, or in the manner agreed upon at the time of the purchase of the goods, or afterwards. Don't know of any demands being called for at that time in respect of which I had made or received no promise, or had made no arrangement for extension of time. There was one exception in regard to Messrs. Doull & Miller and also E. R. Harrington, which was an unsettled account. I had at the time of the giving the judgment, stock unpaid for to the amount of between $8,000 and $10,000. * * * * I know that under said judgment my personal property could have been levied upon and sold at any time; had a conversation with Andrew Frith about giving the judgment to him. He asked me for security, and said that he did not feel like letting the matter remain in my hands without security. This was sometime about June or July, 1874. Can't tell who suggested the judgment. I did not consider that I had gotten the money from Mr. Lovitt for any specified time, and nothing more than the interest to be then due. One thousand dollars only was due previous to the judgment. I received $1,200 from him,—applied that $1,200 in reduction of bank paper, of which Ryerson, Moses & Co. were indorsers, and in payment of wages. In regard to its being in reduction of bank paper indorsed by Ryerson, Moses & Co., I wish to withdraw that statement, and now say that I don't know how it was used, as it was disbursed by Mr. Eakins. I believe that my business had the benefit of it, but cannot say to what particular liabilities it was applied. I know that $500 thereof were paid to Mr. Northup for wages,

—knew at the time how the remaining $700 were applied, but cannot recollect now; believe they were applied in reduction of my business liabilities, but my books will not show it. No entry of the $1,200 appears in the cash book, no entry of the $500 paid to Northup appears in the cash book. * * * * Cannot tell by the cash book how the $700 were paid, &c. Ryerson, Moses & Co. had paid no notes which they had endorsed for me previous to June 27th, 1874, except the Thurston note, which is in account in the ledger, and has been already explained. They had previously endorsed for me to the extent of $2,000, which has been paid by myself. Ryerson, Moses & Co. endorsed a note for me, dated June 27th, 1874. It was payable six months after date, and was for $650. They were first endorsers, the notes being drawn in their favor; also endorsed one for me, July 2nd, 1874, for $550; also 4th July, 1874, for $400; also July 7th, 1874, for $450; also 15th July, 1874, for $300; also July 16th, 1874, for $600; also July 20th, 1874, for $530; also on that date for $200; also August 10th, for $300; also July 17th, for $550; also September 8th, for $350; also September 10th, 1874, for $400. The note of 20th July, above mentioned, was drawn at two months, all the others at three months, and they were all endorsed by Ryerson, Moses & Co., as first endorsers. The above notes are all individual liabilities, and none of them include the amount of any other of them. I wish to make an explanation in respect to a part of my examination yesterday. The balance due Ryerson, Moses & Co., June 22nd, 1874, was $852.09, or $248.60 additional omitted from my statement yesterday. At the time of the judgment to Ryerson, Moses & Co., I owed them $762.22. Ryerson, Moses & Co. sold my stock under that judgment, on the 17th Sept'r, 1874; also at the same time the stock was sold under Mr. Andrew Lovitt's judgment. At the time the stock was sold under the judgments, I owed Ryerson, Moses & Co $1103,25, including the $762.22. This amount is made up in this manner:—

Balance of house account.....	$ 273 98
Costs of judgment	15 80
Fire Insurance premium.....	50 25
Costs remitting money to Weymouth.....	1 00

The goods sold under the execution were sold below their value, but as well as goods so situated generally sell for. Am acquainted with Mr. Cochran, the Agent of Messrs. Doull & Miller. Told him after the judgment and mortgage were given and previous to the advertisement of sale under the execution, that I had not given preference to any particular creditor. At the time of my saying so to him he had been calling upon me for payment or security for Doull & Miller. At the same time I told him of my having given judgment to Messrs. Lovell, and also to my endorsers, Ryerson, Moses & Co., for their security. This conversation occurred in my house in Yarmouth. He suggested a compromise at that time. I asked him to give me a week to consider, and he consented thereto. He mentioned to me that the execution creditors were going to sell the stock, and asked me to endeavor to stay proceedings. I promised him to do so, provided he carried out his engagement. Did not know that executions were issued before Mr. Cossman applied to me, for the reasons already stated. I did not endeavor to stay the executions as Mr. Cossman, I consider, broke his engagement. I believe that the handbills were posted up before notices were served upon me in insolvency. I was satisfied before the handbills were posted that Cossman had commenced proceedings in insolvency, and consequently I made no further effort to stay the executions. * * * * I had other indorsers than Ryerson, Moses & Co.,—A C. Robbins. I never secured him. Abel C. Robbins had, up to that time, endorsed more for me than Ryerson, Moses & Co. ever had. Mr. Robbins never asked me for security. Ryerson, Moses & Co. refused to indorse any further, unless they were secured, and I gave the security for the protection of my creditors. At the time the sale was made under the executions I had beside the property taken thereunder, household furniture, store furniture, horse and carriage, harness and robes, which were worth between seventeen hundred and two thousand dollars, also the book debts. Had an account with Messrs. Gault, Brothers & Co. on my books. On April 4th, 1873, their account was balanced on my books. At that date I owed them $838.52, My account with them on the book ends there. I have no other account with them. I did business with them afterwards and increased my indebtedness,

until at the time of my failure I owed them three thousand and eighty-seven dollars and fifteen cents, about two thousand dollars of which were not due at the time of failure. Goods to the value of $1500, part of the $2000, were sent by them contrary to order. I selected them in Montreal, to be sent if I ordered them within ten days, and I directed them not to send them. The order not to send them was sent by letter *per* mail. The goods came and I kept them. They came during my absence and my employes received them, opened them, put them on the shelves, and used some of them in my business. I invariably left some person in charge of my business while away. Mr. J. C. Northup was then in charge of my business. I don't remember that I instructed him about the conditional order. These were the goods that arrived here in August, 1874. I had selected them in the July previous. At the time the judgment was given to Ryerson, Moses & Co., I had received from Messrs. Gault Brothers goods to the value of $1627.50, which then remained unpaid for, but in respect to which the term of credit had not expired. In respect to the items of their account of September 5th, 1874, of $436, the goods representing it were purchased in the fall of 1873. The note given therefore was an extension on three months previously. * * * * The greater part of the goods received from Messrs. Gault Brothers, in August, 1874, were in my store at the time of the sale under the executions. They were all sold as my property to satisfy the execution claims, and I considered them as my property. I never informed Messrs. Gault Brothers of the judgments which I had given, or of the chattel mortgage,—never made any representation to them, or any person in their employ, of my solvency. The subject of my solvency or insolvency was never mentioned to them by me to the best of my recollection.")

The insolvent says: "The goods received from Messrs. Gault Brothers in August, 1874, were in my store at the time of the sale,"—(made under the executions). "They were all sold as my property to satisfy the execution claims, and I considered them as my property. Never informed Messrs. Gault Brothers of the judgments which I had given, or of the chattel mortgage." (See lines 523–525.) These words will be found there: "The larger portion of my goods, got from

Daniel & Boyd, (unpaid for,) were levied upon under the executions and sold. At the time these goods were obtained *I was not in more than customary difficulty.*" The insolvent says (l. 528): "At that time there was a demand from Doull & Miller which I could not meet." When questioned as to his solvency at the time when he got the goods from Daniel & Boyd, he says (l. 530): "I consider that I was solvent when I got the goods named at that time from Daniel & Boyd. I *consider* that I was then solvent, according to my *present* calculations." He added (l. 535) that he inferred his solvency from his balance sheet made up in January or February, 1874, —a balance sheet which he could not produce. He says, (l. 553), respecting the goods got from Gault Brothers: "These goods were ordered before giving the judgment to Ryerson, Moses & Co., but can't tell whether they were received before or afterwards." (See l. 557–580.) As regards goods got from McMaster & Co., it was proved that nothing had been paid for them, and that they were got immediately before the preferential security given. They were sold under the Sheriff's hammer, under the executions, for the benefit of favoured judgment creditors—l. 621–642; see line 642–653. There is between l. 803 and l. 830* a most suggestive passage in the evidence, showing a flagrant disregard of all business principle, and of the provisions of the Insolvent Acts in the conduct of this insolvent. The evidence, which is very voluminous, I have carefully read, and I have noted passages which, when

* The following is the passage referred to:—"Abel C. Robbins' claim against me is altogether as an indorser up to about $3,000. He had been endorsing for me from fifteen to eighteen years. I never secured his endorsements in any way. He never asked me for any. Young, Kinney & Corning, Todd, Porter & Co., occasionally endorsed, and occasionally Ryerson, Moses & Co., in the absence of A. C. Robbins. I never thought of such a thing as giving the security to these parties, as it was not asked for. I gave security to Ryerson, Moses & Co. to protect my creditors. My stock never would have been sold under execution by Ryerson, Moses & Co., had it not been that Doull & Miller made an unreasonable demand upon me. I never had any conversation with any member of the firm of Ryerson, Moses & Co., about the matter, but only with Mr. Eakins. When I make the assertion that the stock would not have been sold under execution at the suit of Ryerson, Moses & Co., I make it on the authority of what Mr. Eakins told me. I gave the confession of judgment because Mr. Eakins told me that Ryerson, Moses & Co. required it. Mr. Eakins was their employed agent, and did all their work of that description. When I gave the confession of judgment, I believed Mr. Eakins to be the proper person to be dealt with. I made no effort to see any member of the firm of Ryerson, Moses & Co., as I did not consider it necessary to do so. I thought it unnecessary to do so. I had no conversation with Mr. Eakins about the time of giving the judgment. I was not in embarrassed circumstances at the time the judgment was given, in April, 1874. I was able to meet my liabilities as customary.

referred to and considered, will establish the views that I have expressed. To enter into further details I have felt to be quite unnecessary. The evidence derived from the lips of the insolvent shews that all the provisions of the Insolvent Acts respecting books and accounts required to be kept by a trader have been entirely disregarded by this insolvent. It follows from his own admissions that he never at any time within ten years immediately previous to his actual proved insolvency knew or had the means of knowing the state of his affairs. It follows also, therefrom, that he never, within the period named, knew whether or not the expenses of his household were such as were justified by his means. Whether he was or was not justified in continuing his trade as he did continue it, whether he was or was not, incurring debts with a reasonable prospect of paying them, were alike uncertain to him, and his ignorance in those respects was a necessary consequence of his recklessness and his utter disregard of his obligations duly to keep books and accounts.

The insolvent applied to the learned Judge of Probate at Yarmouth for his discharge, under sec. 105 of the Insolvent Act of 1869, and the learned Judge ordered his discharge, while suspending the operation of it for the period of one year.

From that decree certain creditors of the insolvent have appealed. I am of opinion that the decree of the learned Judge must be reversed.

Graham for the insolvent, on Dec'r 12th, 1877, pointed out the hardship of making the insolvent pay the costs of the case when his discharge was taken away.

Meagher—contra.

The Court now, (December 15th, 1877), per SIR WILLIAM YOUNG, C. J., directed the costs to be paid out of the estate.

EVANS *v.* ROSS.

WHERE plaintiff discontinued an action of replevin, the defendant having possession of the goods under a return bond, the Court declined to allow defendant to try the cause, or to enter up judgment *de retorno habendo*, but passed a rule for judgment for the defendant, with costs.

THIS was an action of replevin for certain goods claimed by the plaintiff, which were, under the writ of replevin, taken out of the possession of the defendant, but returned to him on his filing a bond. The cause was tried at Halifax at a previous term, and a verdict found for the plaintiff, which the Court, after argument, set aside. The plaintiff and defendant then each served on the other notice of trial, after which the plaintiff discontinued the action. The cause coming on before JAMES, J., on the docket of trials, the judge refused to try it, as there had been a discontinuance, but referred the matter to the full Court.

McCoy, Q. C., (December 11th, 1877,) contended that he had a right, being an actor in the suit as well as the plaintiff, to go to trial, nowithstanding the discontinuance, otherwise that he should have judgment for the return of the goods, in order to settle the title, as under the bond the defendant could only retain the goods until the question of title was determined.

The COURT, after consideration of the matter, (December 15th, 1877) granted a rule *nisi* for the entering up of a judgment for the defendant, with costs.

McCoy, Q. C., afterwards, (December 22nd, 1877,) moved to make absolute the rule.

Wallace, contra, objected to the clause as to costs, contending that the discontinuance itself gave the right to costs, and further, that the defendant could not get a judgment *de retorno habendo*, as he had the goods already.

The COURT, (December 22nd, 1877,) made the rule absolute that judgment should be entered up for the defendant, with costs.

THE QUEEN *v.* LEVY, ET AL.

WHERE convictions by the Stipendiary Magistrate of the City of Halifax under section 140 of the City Charter are brought up by *certiorari*, the Court can review any matter of law, but cannot interfere with his decision in respect to the facts.

SIR WILLIAM YOUNG, C. J., now, (January 4th, 1878), delivered the judgment of the Court, orally:—

In this case the defendants were convicted by the Stipendiary Magistrate of the city of Halifax on a charge of receiving stolen goods, and the cause came before us on a *certiorari* to set aside the conviction. The decision of the Stipendiary Magistrate is as follows:—

"After a most careful consideration of the evidence in this case, and the various circumstances elicited therefrom, viz., the individual from whom the articles were purchased,—a cook on board a small craft, and the time of bargain and sale,—after 9 o'clock at night, and their subsequent conduct, I therefore have come to the conclusion that there is sufficient proof of the accused's guilty knowledge of the articles having been stolen. The sentence of the Court is that they each pay a fine of twenty dollars and costs, and, on non-payment, sixty days in the city prison."

He considered that there was sufficient proof of guilty knowledge on the part of the accused. I do not know that I should have been able to arrive at the same decision, although there were some very suspicious circumstances connected with the transaction. However that may be, I have no doubt that the Stipendiary Magistrate exercised a perfectly independent judgment upon the matter, and the question now comes up before us for the first time as to the construction of this clause (section 140) of the City Charter, Acts of 1864, cap. 81; which is as follows:—

"In no case where the Mayor or any Alderman shall sentence any party to punishment by fine or by imprisonment or by both fine and imprisonment, shall any appeal be allowed from such sentence, except by writ of *certiorari* or *habeas corpus cum causa*."

Now this clause is very inartificially framed, for if no appeal is allowed except by *certiorari*, that would seem to imply that there is an appeal by certiorari. But we have

come to the conclusion that this section does not permit us to inquire into the facts on a certiorari, and that the Legislature has given the Stipendiary Magistrate, who, under section 4 of cap. 82, Acts of 1867, exercises the jurisdiction of the Mayor or Alderman in the section above quoted, the sole power to adjudicate as to the facts. It amounts to this, that where proceedings are brought up by writ of certiorari, any matter of law, as for instance that the sentence was for a longer term than that permitted by the statute, or that the prosecution took place after the limited time, can be reviewed, but we cannot interfere with the decision of the Stipendiary Magistrate in respect to the facts.

I have taken some pains to look into the origin of this clause, for it is entirely *sui generis*. In 1851 when the Equity Judge, the late Mr. Justice McCULLY and myself consolidated the statutes, we applied to the City Council to revise the acts relating to the city, and those acts were carefully consolidated by the late Beamish Murdoch, and appear in the Private and Local Acts of Nova Scotia, published in 1851, in the form of "An Act concerning the City of Halifax," section 87 of which provides that the Mayor, or in his absence one of the aldermen in rotation shall hold a Police Court to hear and determine in a summary way larcenies of goods not exceeding ten pounds in value, the receiving of stolen goods, assaults, &c., and shall punish by imprisonment not exceeding ninety days, or fine not exceeding ten pounds and costs of prosecution; and the section concludes with these words: "In no case where the said Police Court shall sentence any party to punishment by fine or by imprisonment, or by fine and imprisonment, shall any appeal be allowed from such sentence except by writ of *certiorari* or *habeas corpus cum causa*."

The consolidating Act of 1864, cap. 81 of the Acts of 1864, entitled, "an Act concerning the City of Halifax," provides for a City Court to be held by the Mayor or one of the Aldermen in rotation. By section 130 of the Act a somewhat extended criminal jurisdiction is given to this Court, and section 140 contains a prohibition against appeals, exactly similar to that contained in the section of the Act of 1851, already quoted.

Then comes the Act of 1865, cap. 87, "to amend the Act concerning the City of Halifax." Section 5 of this Act pro-

vides that the Mayor, or in his absence the presiding alderman at the Police Office, shall have a jurisdiction like that given in the Act of 1851, (somewhat less than the Act of 1864,) and by section 6 the City Court had jurisdiction over smaller offences,—such City Court consisting of three persons, who must agree in convicting, as provided by section 7, or the prisoner be remanded to take his trial before the Supreme Court, provided all concur in directing such remand. By section 12 the Police Court may sentence minors, and by section 13 an appeal is allowed in all cases from any decision of the City Court, but nothing is said of an appeal from the Police Court.

Cap. 82 of the Acts of 1867 appoints a Stipendiary Magistrate for the City of Halifax. By section 4 of that Act the Stipendiary Magistrate is to have the administration of police and all the executive powers of the Corporation in criminal matters. Nothing is said of an appeal.

Section 140 in the consolidation of 1876, prepared by a committee consisting of Aldermen Thompson and Power, substitutes the "Stipendiary Magistrate" for the Mayor or Aldermen in the original section 140 in the Act of 1864. That clause as it stands has never been enacted by the Legislature, and I doubt if there is sufficient authority for the substitution.

The County Court Act of 1877 provides for an appeal from the decision of the Stipendiary Magistrate in all civil cases, but no appeal is given in cases like the present, and we hold that this Court has no power to interfere with convictions by the Stipendiary Magistrate of Halifax. The *certiorari* in this case must be set aside and the fine imposed. If the Legislature see fit to provide for an appeal in such cases that is for them and not for us.

CITY OF HALIFAX *v.* VIBERT.

WHERE a motion is made to quash a *certiorari* on the ground that no step has been taken within a year, the rule will be absolute in the first instance.

IN this case *J. S. D. Thompson* moved, December 22nd, 1877, to quash the certiorari, on the ground that no step had been taken within a year.

Lenoir contended that there should be a rule *nisi* in the first instance, Mr. Motton, the attorney of the defendant, being absent.

J. S. D. Thompson, in reply, said the Court had established the rule that where the motion was on the ground that no step had been taken for a year, the rule would be absolute in the first instance. *City of Halifax* v. *Porter*,* decided last term.

The Court afterwards, on January 4th, 1878, *per* SIR WILLIAM YOUNG, C. J., granted a rule absolute in the first instance.

FORSYTH *v.* SYMONDS.

WHERE a rule was taken under the statute to set aside a verdict, and the words, "to respond the judgment," did not appear in the bail-piece, the Court pronounced the bail wholly insufficient.

IN this case, which was tried at the last sittings, before DESBARRES, J., a verdict was found for the defendant, and, on application to set the verdict aside, a rule was refused. Plaintiff then took out a rule under the statute, filing bail. The words, "to respond the judgment, "did not appear in the bail-piece, and, on this ground,

Meagher, for the defendant, (December 22nd, 1877,) moved that the rule be discharged and the cause struck off the docket.

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* In the case cited *J. S. D. Thompson* moved last term to quash the certiorari, on the ground that the affidavit was headed in the cause, that the allegations were insufficient, that the writ had not been properly allowed, and that no step had been taken within a year. *Per* SIR WILLIAM YOUNG:—The rule will be absolute in the first instance, if the lapse of time is conclusive.

Weatherbe, Q. C.—I can't understand why these words are mentioned. There is no such thing known in the bail-piece. The words are not applicable there. It is true the bail is given to respond the judgment, but there is nothing to require those words in the bail-piece. Refers to form in *Chit. Arch.* No form can be shown with the words, "to respond the judgment," or any similar words. The words here are, "*in a rule nisi under the statute.*" It is not necessary that such words should be mentioned, but we have those words here. *Tidd's Forms*, p. 102.

Meagher.—The bail piece is defective. It says, *in* a rule *nisi*, not *on*. The bail pieces referred to are to render the body. This is to pay money. In *Lordly* v. *McRae*, the Court expressed an opinion that a bail piece in this form was incorrect; but the parties agreed to waive the irregularity.

Weatherbe, Q. C.—If the Court decides against the bail, I presume the parties will have an opportunity to file bail.

Meagher.—It has not been allowed since *Tremaine* v. *The Gas Co'y.*, on which the new rules were made.

SIR WILLIAM YOUNG, C. J., now, (January 4th, 1878,) delivering the judgment of the Court, pronounced the bail wholly insufficient.

THE QUEEN *v.* CAMERON, ET AL.

To a declaration on a bond to Her Majesty, conditioned for the performance by one of the defendants of the duties of Collector of Rates, and the immediate payment over to the County Treasurer of such rates whenever the sums received amounted to $100, defendants pleaded, on equitable grounds, that while the said collector was travelling on the Queen's highway with the sum of $336 lawfully in his possession for the purpose of paying it over to the County Treasurer, he was, without any fault or want of diligence, forcibly and feloniously robbed of said sum.

Held, on demurrer, that the plea was good.

THIS was an action against the principal and sureties on a bond for the faithful discharge by the principal of the duties of Collector of Taxes. Equitable plea as to $336 of the money claimed as penalty of the bond, that the Collector, while travelling on the highway to pay over the money, without any default on his part, was robbed. Demurrer to that plea.

Graham, for Demurrer.—The breach is that when defendant had a sum of $100 he did not pay it over to the County Treasurer. He admits that he had $300 in his possession.

Thompson objected that no matter of law was set out at all but simply an allegation that the plea was bad.

Graham.—I presume the learned counsel relies on the statute that the grounds should be set out. I represent the Crown and am not bound by the statute. The Attorney General can demur at the bar orally.

Thompson.—I presume then that the Attorney-General is coming. The right to come to the Bar applies only to the Attorney-General.

YOUNG, C. J.—The question is whether that is a good plea in Equity. If this could be demurred to before the Equity Judge, it can be here.

Thompson.—The Equity statute says the demurrer shall be argued on the same principles as in the Common law Courts.

Graham.—It is clearly not a good plea in law. They are bound absolutely to the letter of the bond. Even the act of God, I think, would not excuse, as it would in the case of a common carrier. *Broom's L. M.*, 233; *E. Bl. & E.*, 746; *L. R.*, 4 *C. P.*, 1.

If there is no help for them in law there is none in Equity at all. The statute, R. S., p. 469, allows an equitable plea where the defendant could go to Equity to get relief from the judgment. Now he could not do so against the Crown. The statute of 33 Hy. VIII., cap. 39, would enable them to bring in this plea, if in force, but it has been decided not to be in force here,—*Uniacke* v. *Dickson*, James' Reports, 287. This plea would probably be some defence where that statute has been decided to be in force, as it is in Ontario and New Brunswick. Cites *King* v. *McLaughlin*, (unreported.) That case is referred to in a work on the Supreme Court, by Cassells. It is also referred to in the judgment in *Uniacke v. Dickson.* But it is not in force here, and there is not therefore a shadow of law for the plea.

The plea is only pleaded to part of the money claimed, and is therefore defective apart from the ground just stated, as only an answer to part. *Story Eq., Jur.*, sec. 106.

Admitting that both the County and the collector are innocent, there is no reason why the County should lose.

Thompon, contra.—It is alleged that it was *lawfully* and *duly* in the hands of the collector.

YOUNG, C. J.—It would have been a great deal better if you had averred that it was collected within the time, (*i. e.* the time mentioned in the bond within which it should be paid over).

Thompson.—It was not duly in his possession if it ought to have been paid over. He says he was on his way to pay it over. The fair interpretation is that it had been just paid to him, and he was going to pay it over. Otherwise, it would not be, as alleged, *duly* in his possession. *(11 M. & W.*, 875.) He says he went to pay it over according to the condition of the bond, and further, that he was robbed without any default or lack of diligence. Performance of the conditions of the bond is averred.

The contention that where both parties are innocent the defendants must suffer, does not apply, because this is an action against sureties who are favored.

As to the contention that this is only a plea to a part,—it is an answer to the whole declaration, though not to the whole amount. It is an answer to all that is averred in it, as to $300.

The case in *El. Bl. & El.*, was a plea of physical inability to a count for breach of promise. The Court was equally divided in opinion, and it was in Exchequer Chamber decided by a majority of one, some of the most eminent judges dissenting from the judgment of the majority.

Walker et al. v. *British Guarantee Association*, 18 Q. B., N. S., 208, goes to the whole of this case. *Story on Bailments*, sec. 620; *3 Atkyns*, 480; *2 Chancery Reports*, 9; *3 Vesey, Jr.*, 566; *2 Vesey, Sr.*, 240.

Graham, in reply.—I don't think this plea raises a defence. This is on a bond that the money shall be paid over. If he was attacked on the ground of negligence, the robbery would be a good answer. If the issue was whether he used due diligence, we would have to fail. The bond in the Queen's Bench case cited was of that kind. It only required faithful

performance of duties. Here the condition is different. It is not that he shall use due diligence, but that he shall pay over the money. (SMITH, J.—The question is whether under that decision this person is not a bailee). We admit the faithful performance of his duty. We do not attack him as a bailee, but he is bound strictly under his covenant to pay over the money, and has not done so.

I admit the case cited is very strongly in point; but there is another difficulty, that the plea is only to a portion of the money claimed. On that point we would be entitled to judgment.

DESBARRES, J., now, (January 12th, 1878), delivered the judgment of the Court:—

This is an action on a bond made by the defendants to our Sovereign Lady the Queen in the sum of $1,200, in which, after reciting that Roderick Cameron, one of the defendants, had been duly appointed by the Court of General Sessions of the Peace for the County of Inverness, a collector of taxes in an Electoral District, and had taken upon himself the office, the condition of the bond was declared to be that if the said Roderick Cameron should well and truly perform the duties incumbent on him by law as such collector, in collecting and paying in to the County Treasurer all such sums of money as should be received by him from the rateable inhabitants of such District, and should use all diligence to collect the said County rates, and should, whenever a sum amounting to $100 was collected, pay the same immediately to the County Treasurer, and should also obey and abide by all and every regulation made by the said Court of General Sessions of the Peace, in respect of such collection; then the said bond should be void, otherwise to remain in full force and virtue. The declaration alleged that the said Roderick Cameron did not well and faithfully perform the duties incumbent on him by law as such collector, nor pay in to the County Treasurer all such sums of money as were received by him from the rateable inhabitants of said District, &c. The defendant pleaded; first, *non est factum;* secondly, performance by Roderick Cameron of the duties incumbent on him by law as such collector, in collecting and paying in to the County Trea-

surer all such sums of money as were received by him from the rateable inhabitants of said District, and also a full and strict performance in all other respects of the conditions of the bond; thirdly, for a plea and defence on equitable grounds by the defendants as to part of the money by the said Roderick Cameron collected as in the second plea mentioned, viz., the sum of $336, they said that while the said sum was lawfully in the possession of the said Roderick Cameron, and while he was travelling on Her Majesty's highway, with the said sum in his possession, for the purpose of paying the same in to the said County Treasurer, in pursuance and according to the condition of the bond, the said Roderick Cameron was, without any fault, want of diligence or care on his part, forcibly and feloniously robbed and dispossessed of said sum of money by certain persons to the said Roderick Cameron unknown, and that they the defendants, in Equity and good conscience, should not be held answerable for the said lost sum of money or for the non-payment of the same under the said bond, and they therefore invoked the aid and protection of the Court against this action and all claims made upon them by reason of the non-payment of said sum, in pursuance of said bond. To this third plea, the Attorney General of our said Sovereign Lady the Queen, and for and on behalf of Her Majesty, demurred upon the following grounds:

First; That the defendants, by their said plea, have not made such a case as entitles them, in a Court of Equity, to any relief from or against the plaintiff, touching the matters contained in the said plea, or any of such matters.

Secondly; That it appears by the defendants' own showing, by their said plea, that they are not entitled to the relief prayed for by their said plea against the plaintiff.

Assuming, as we must assume, the statement in the third plea to be true, that Roderick Cameron, while on his way to pay over to the County Treasurer the money he had received as collector of taxes, was, without any fault or want of care on his part, forcibly and feloniously robbed of that money, the question for our consideration is, whether that fact would, in a Court of Equity, be regarded as a sufficient excuse for the non-payment of the money to the County Treasurer, under

the condition of the bond, in which no provision is made for the protection of the collector on the happening of such an event. That it ought in Equity and good conscience to be, and that it would be so considered, I have no doubt on reading two of the cases cited by Mr. Thompson at the argument, to which I will now briefly refer. In *Knight* v. *Lord Plymouth*, 3 Atkyns, 480, it appeared that a receiver of rents, who had been appointed under an order of the Court, of Lord Plymouth's estate, considering it was safe to remit a sum of money, (£700) which he had received in rents, to London, paid it over to a tradesman in Worcester, of good standing and credit, from whom he took and forwarded Bills of Exchange on London for the amount. The tradesman soon after having become bankrupt, an application was made to the Court against the receiver, to make good the loss that had happened. Lord HARDWICKE, on the master's report of the facts, said, "it would be very hard to oblige the receiver to make good a loss which was not owing to any default of his, but as the sum was large it was a necessary precaution to remit by bills rather than in specie, and at the time the money was paid to the tradesman, he had no reason to doubt its being lodged in a safe hand," and therefore indemnified the receiver in the act he had done. In *Jones* v. *Lewis*, 2 Vesey, Sr., 240, a decree having passed against defendant's husband, to whom she was administratrix, for a general account of assets, and for payment of the balance, exception was taken by the defendant to the report, that certain goods which had been delivered by her to the solicitor, and offered to the plaintiff, had since been stolen from her solicitor, for which she was therefore not accountable. Lord HARDWICKE, considering the case as if the robbery had been without any tender of goods to the plaintiff, said; "If the bailee of goods against whom there is an action of account at law, loses the goods by robbery, that is a discharge on an action of account at law, and if a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them as he would keep his own." The exception taken by defendant was therefore allowed. See also *Rowth* v. *Howell*, 3, Vesey, Jr., 566. These cases, it appears to me, clearly shew that the facts set forth in the defendant's third plea, by way of defence on equitable grounds, would be sufficient in a Court

of Equity to entitle the defendants to the relief prayed for. But the case of *Walker et el.* v. *The British Guarantee Association*, 18 C. B. (N. S.) 276, is conclusive, inasmuch as it shews that the facts set forth in defendant's third plea, if proved, would be a good defence in a Court of Common Law, as well as in a Court of Equity. That was an action of covenant in which the plaintiffs, as trustees of a Benefit Building Society, sought to recover from the defendants as sureties of the treasurer of said Building Society, a sum of money which said treasurer had received and not paid over to the bankers of that Society, in consequence, as was alleged, of his having been robbed of the money. The fourth plea pleaded by the defendants in that case was in substance the same as the third plea in this case. There was a verdict for the defendants on the fourth issue, and for the plaintiffs on the other issues on which contingent damages were assessed. The plaintiffs' Counsel moved the Court for a rule to enter up judgment for them *non obstante veredicto*, contending that the fourth plea was no answer, that the declaration charged the Treasurer with having received money on account of and for the use of the Society, and defendants had covenanted that he should faithfully account to the trustees for all money received, that the allegation made of a loss by robbery was not such an accounting. It was held that the plea found for the defendants was clearly a sufficient answer to the declaration, and the Court therefore refused to grant a rule for judgment for the plaintiff *non obstante veredicto*. I think the defendant's third plea, according to the ruling in the last and preceding cases referred to, must be considered a good plea, and that there must be for that reason judgment for the defendants in this case.

FRASER *v.* BRUCE.

PLAINTIFF held a bill of sale of a pair of oxen from McLeod the owner, who continued in possession, the bill of sale being duly recorded, and upheld as valid by the jury. After making the bill of sale, McLeod was arrested at the suit of defendant, and, on swearing out of jail, assigned the oxen to the defendant, who sold them at auction to Wade; whereupon plaintiff, under a writ of replevin against defendant, took the oxen out of the possession of Wade, who was no party to the suit. Plaintiff having obtained a verdict, the Court set the verdict aside, with costs, non-suited the plaintiff, giving the defendant the costs of the action but not of the trial, and directed the bond to be put on file, subject to the order of the Court or a Judge.

THE plaintiff became security to one Jonas for the price of a pair of oxen sold by Jonas to J. McLeod, and took a bill of sale of the oxen, dated November 20th, 1874, which was duly recorded. McLeod continuing in possession of the oxen. McLeod was afterwards arrested under an execution of the defendant, and on swearing out of jail, assigned the oxen, with other property, to the defendant, who sold them at auction to J. Wade, the purchase money being paid to the defendant. Plaintiff, under a writ of replevin issued against the defendant, took the oxen out of the possession of Wade. To the action of replevin, defendant pleaded, that he did not take the goods,—that he did not detain them,—that the goods were not the plaintiff's,—that the plaintiff never had possession,—and, by leave of the Court, that the cattle in question were those of the defendant and not of the plaintiff.

The case was tried at Bridgetown, and a nonsuit directed by the Judge, but the plaintiff refusing to become nonsuit, the case went to the jury, who found for the plaintiff and upheld the *bona fides* of the bill of sale.

A rule to set aside the verdict was argued during the present term, the grounds of which appear in the argument.

Rigby, Q. C., for the rule.—The sale of the cattle, (under the execution in *Bruce v. McLeod*), was on the 24th of Dec'r, 1874. The writ of replevin in this cause was issued on the 31st of the same month, one week later. Replevin will not lie, because the goods were not taken out of the possession of the defendant. The writ need not be in the form in which it is put, which is for detention merely. (See R. S., Ch. 94, sec. 340, p. 499). This action is not founded on wrongful detention, but is for a wrongful taking. There is no proof of a wrongful detention, and the plaintiff cannot go beyond his declaration to prove wrongful taking. Under the sections of the 94th Ch., R. S., referring to replevin, it is not intended that replevin shall be brought against a defendant, when the goods are not taken out of his possession. Section 333 of Ch. 94, R. S., declares that the Sheriff shall only serve the writ on defendant after taking the property out of the possession of defendant. Section 334 gives the Sheriff the right to go into the house of the defendant, or any person holding and concealing the goods

for him. Surely the Court will not hold here that this gives the right to break open the dwelling house of a person, not the defendant, who has bought goods at a sale. Further, the Court is virtually asked to say that any party who has bought goods at a sale, not the defendant, may have his person searched for goods presumed to be concealed; and while the defendant can avoid this by giving a bond, a person not a defendant would have no such privilege. In *Wiggins* v. *Garrison et al.*, Burton's N. B. Rep., 17, it was decided, as we contend in this case, that in replevin the Sheriff can only take goods from the possession of a defendant in the action.

Sedgewick, contra.—The only thing that could give the Court jurisdiction in this case would be a taking within the meaning of the law. If the Court has no jurisdiction here, the defendant should move to set aside the writ without appearing. The defendant here has appeared and pleaded, and thereby acknowledged the jurisdiction of the Court, and its power to try the issues raised in the suit.

YOUNG, C. J.—The question is not one of jurisdiction, but whether this action will lie.

Sedgewick.—The question is whether the Court has jurisdiction to try the right to the property here, which has been taken out of the possession of a person not defendant.

At the trial of a cause, the only matters to be settled are the issues. The first issue here, as raised by the pleas, is that the defendant did not take the cattle as alleged; second, that he did not detain. It is in proof that the defendant wrongfully took them and unlawfully detained them several days, until the day of the sale, at least. The third plea raises the issue that the cattle are not the cattle of plaintiff, and the jury have found that issue in favor of the plaintiff.

Per curiam. Replevin is not for a detention of a year ago, but for a detention continuing at the time of issuing the writ.

YOUNG, C. J.—You have your action of trespass, but not replevin. You may have replevin against the man who has possession of the goods.

Sedgewick.—I contend otherwise. The plaintiff might then be compelled to bring fifty actions, as the goods might be

passed about. The argument derived by defendant's Counsel from the replevin bond fails, because the bond is only given for the protection of the Sheriff.

McDONALD, J.—The condition of the bond says nothing about the Sheriff.

YOUNG, C. J.—No, and we never heard such a thing contended before.

Sedgewick.—The contention that the Court, if judgment is for the defendant, must order a return of the goods to the defendant, shews that the exception taken here should have been taken by motion before pleading. The design of our act is to make replevin with us give the same remedy as the action of detinue in England. See *9 M. & W.*, 19, cited in Bullen & Leake, 512. In England the judgment in detinue is for a return of the goods, or for the value of them, as assessed by the jury. See section 329 of our statute, (R. S., ch. 94.) It says, "where goods have been wrongfully taken, or (have been) wrongfully detained," the action of replevin will lie, The effect of a judgment for the defendant will be to enable a wrongful taker to evade the rights of the owner of the goods who brings replevin by a sudden and fraudulent sale of the goods. *Morris on Replevin*, 72.

Rigby, Q. C., in reply.—The position contended for by plaintiff's Counsel would enable plaintiff to bring writs of replevin against the defendant, the Deputy Sheriff, and everyone else through whose hands the goods passed on the one taking of the goods from an outsider, not a party to the action.

SIR WILLIAM YOUNG, C. J., now, (January 12th, 1878), delivered the judgment of the Court:—

The pair of oxen for which the writ of replevin in this case was brought was sold by one Jonas to John McLeod, and the plaintiff Fraser became security for the payment, and for this and other liabilities took a bill of sale from McLeod, 20th November, 1874, which was duly recorded, and, being attacked on the trial, was upheld by the jury as a *bona fide* and valid instrument. McLeod continued in possession of the oxen, and having been arrested under an execution of Bruce, the

defendant, 27th November, 1874, swore out and assigned the oxen and other things to Bruce, who took them and had them sold at auction, 24th December, 1874, to John Wade for $70.50, which he then paid to Bruce, and thereupon the plaintiff, under his writ of replevin against Bruce, took the oxen out of the possession of Wade, who is no party to the suit.

The pleadings are as follows; The writ commands the Sheriff to cause to be replevied to the plaintiff the oxen which the defendant unjustly detains, and summons the said defendant to appear at the suit of the plaintiff, who says that the said defendant is unjustly detaining the said goods. To this the defendant pleads, first, that he did not take said cattle; secondly, that he did not detain; thirdly, that the cattle were not the cattle of the plaintiff as alleged; fourthly, that the plaintiff never had possession of the said cattle; and fifthly, by leave, that the said cattle were the cattle of the defendant and not of the plaintiff as alleged.

Let us then consider how this matter stands. The plaintiff has a verdict, and, if it is upheld, he retains possession of the oxen as against Bruce, and in violation of the rights of Wade, who has not been heard, and has had no opportunity of retaining the oxen on security, as he might have done, if a defendant, had he thought fit, under our statute, section 343. If, on the other hand, the verdict is set aside, and a judgment of nonsuit entered on the whole record, which we have a right to do under the Judge's minutes, Bruce would be entitled to recover on the plaintiff's replevin bond the value of the cattle, which belong to Wade and not to him.

This dilemma, showing an injustice either way, illustrates the wisdom and the value of the rule which obliges a plaintiff in replevin to bring his action against the party in possession of the goods, that is, a *bona fide* and actual possession, not a collusive one. The case of *Wiggins* v. *Garrison, et al.*, of which we had a certified copy from Berton's Reports, fol. 17, brings out the reason of this rule, and the old authorities on which it is founded, independently of the modern clause, borrowed from the United States, to which I have referred. In that case, decided in 1834, the late Chief Justice CHIPMAN, after detailing the proceedings in replevin as a peculiar remedy, went on to say; "All these proceedings, and it may be added the

replevin bond also, are evidently founded on the principle, that the defendant named in the writ is the person from whom alone the goods are to be replevied, and who is to answer to the plaintiff for taking and detaining them, and to have a return of the goods if he show himself entitled thereto. The converse follows, that if the goods are not found in the possession of the defendant named in the writ, the writ is not applicable and cannot be executed."

There is nothing in our Practice Act, chap. 94, sections 329 to 345, inconsistent with this fundamental rule, though these sections are widely different from the English law, and introduce new issues and modes of pleading.

For these reasons it appears to me that the only course we can take is to set aside the verdict for the plaintiff with costs, and as he has sued out against the defendant a writ which will not lie, he must be nonsuit, which will entitle the defendant to the costs of action but not of the trial, the replevin bond to be put on file and held subject to the order of this Court or of a Judge.

Wade we cannot help in this action, and he must seek his remedy as he may be advised. Bruce has sold him oxen which his debtor McLeod had previously conveyed to Fraser, and both McLeod and Bruce may be worth nothing, and it is possible that in any issue between Fraser who has got possession of the oxen and Wade, the *bona fides* of the former's bill of sale might be again upheld.

MARMAUD *v.* McCREADY.

PLAINTIFF brought action for the non-delivery of certain goods. Defendant pleaded among other pleas that plaintiff was estopped by a judgment in a former suit brought by the present defendant against the now plaintiff for the price of the goods, to which action it was pleaded that the goods had not been delivered, which issue was found against the present plaintiff. Replication, among others, on equitable grounds, in effect that the judgment pleaded had been recovered without plaintiff having had an opportunity, owing to unforeseen circumstances, of substantiating his plea by testimony. The identity of the issues raised in the two suits was clearly established, and, a verdict having been found for plaintiff, *Held* that the doctrine of estoppel applied, that the equitable replication, not setting out the circumstances referred to, was insufficient, and that the verdict must be set aside.

THIS was an action on the case for the non-delivery of certain goods alleged to have been bought and contracted to be delivered. Pleas that the goods were shipped according to to agreement, consigned and addressed to a person in Pictou,

N. S., whom plaintiff had appointed as his agent for the delivery of the goods, and that the goods arrived at Pictou, and a plea of estoppel on the ground that the damages claimed in this action were in issue as a defence in an action against the present plaintiff at the suit of the defendant in this action for the price of said goods, and that judgment was obtained by the plaintiff in said action. Replication, after traversing pleas, that this is an action for unliquidated damages, and that the other action was for a sum certain, and on equitable grounds, that from unforeseen causes plaintiff was prevented from offering testimony in support of pleas pleaded by him to the other action. There were demurrers to several of plaintiff's replications.

The cause was tried before Mr. Justice McDONALD, at Arichat, in June, 1876, and a verdict found for plaintiff "for the value of the goods and twenty-five per cent additional." The verdict was subsequently amended.

A rule *nisi* to set the verdict aside was granted by the Judge, and argued February 22nd, 1877, before YOUNG, C. J., and DESBARRES, SMITH, and JAMES, J J.

Meagher, in support of rule.—The plaintiff is estopped from bringing this action by the record in the first action, in which he pleaded the same facts. In that action he pleaded that these defendants contracted to deliver the goods in question at Arichat; that issue on the plea was found against him; that issue is raised here as a material part, the turning-point, of the declaration in this action. *7 T. R.*, 269, is a very strong case on this point.

YOUNG, C. J.—I question whether the doctrine laid down in this case is good law now under an equitable plea.

Meagher, cites also *5 Bingh., N. C.*, 449. There it was held that a defendant, having put plaintiff to expense to disprove a plea by not withdrawing it, was estopped from raising the matter in a new action. *3 East*, 346; *Smith's L. C.*, 776; note to *Trevivian* v. *Lawrence, et al.*, 2 Smith's L. C., 617, 718. The equitable plea setting up that this plaintiff was prevented by unforeseen circumstances from attending the trial and giving evidence under the plea in question is bad. It should define the circumstances. *Taylor on Ev.*, secs. 1445 and 1454; ib. 1483–9.

There can be no question that these are the same goods, and the agreement the same. The burden of proof is therefore on Marmaud to show that the cause of action here is not the same as the defence raised in the plea in the other action. *Bigelow on Estoppel*, 2 ed., pp. 41–45, 108–9. If plaintiff can recover in this suit, he could contest this matter over again if the verdict here had been against him. *22 L. T., N. S.*, 631; *2 L. R., Exch.*, 14; *10 Gray*, 23.

As to the contract, the burden of proof was upon plaintiff. The only evidence is that of plaintiff on one side, and on the other a disinterested witness, with corroboration from a written memo., taken down by himself at the time.

The learned Judge misdirected the jury in instructing them that the defendants here were bound by the agreement of their travelling agent to deliver the goods at Arichat. The agent proved that he had no authority to do anything of the kind. His Lordship erred also in submitting to the jury whether the causes of action were the same in this and the previous suits. It is a question of law. It was not contended that the transaction was not the same.

Cites *Story on Agency*, § 131, 239.

There being no contract under the statute of Frauds, Marmaud could have defeated us in the other action, and cannot recover here, for the same reason.

Thompson, contra.—On the merits, the case that went to the jury was a very clear one. The plaintiff's evidence was clear and consistent with the ordinary course of such transactions. McLinn was not a disinterested witness; he was in defendant's employ, and was the man on whom the responsibility for the mistake in this transaction rests. His own evidence is that the order he sent to these defendants did not contain the memo. that the goods were to be sent to James Ives, Pictou.

As to estoppel, not only an Equity Court, but a Court of Common Law will not hold a party estopped from bringing his action, because the subject matter was pleaded in the former action, if the verdict in the former action was a general verdict, and there was other matter to sustain it. *13 M. & W.*, 137. We have recovered in this action only damages for loss of profits. The plea off-setting damages in the other suit con-

tained no defence, and there is authority to show that such a plea does not estop. *Brightly's Dig., N. Y. R.*, 1486–7; *Smith's L. C.*, (Am. ed.) 769, 771–2–3, 780 to 784, 792 to 794; *8 M. & W.*, 858; *6 T. R.*, 607; *10 C. B., N. S.*, 812. These cases show clearly, particularly the case in 6 T. R., 607, that the Court will go behind the record to see what was tried in the former action.

We did not plead in the other case the identical contract upon which we have now declared. The case in 10 C. B., N. S., 812, shews that the fact that there was a defence which might have been successfully raised to the former action, but was not, constitutes no estoppel. The judgment in the former action here was virtually a judgment by default, no evidence being given on behalf of defendant, with the exception of evidence of his attorney as to a notice.

There is a letter of defendant's in evidence, admitting that the goods had not been forwarded by the steamboat company.

As to the indefiniteness of the verdict, they have given him just what he testified as to the difference between the invoice price of the goods and their market value. Twenty-five per cent. on the invoice is easily calculated.

Cites *2 B. & Ad.*, 652; *9 Moore*, 724; *2 Bingh.*, 377. The case cited from *2 L. R.* is not a case against us. *Taylor on Evid.*, 1510, 1512; *6 L. R., Q. B.*, 687.

DeaBarres, in reply.—Your Lordships cannot go back of the record; you are bound to assume that all the issues on the record were tried. But here the issue raised in this action as to the contract to deliver the goods was the very gist of the former action.

Cites *6 Bingh., N. C.*, 220; 2 *Exch.*, 665; *1 El. & Bl.*, 501; 1 *L. R., C. P.*, 188; *3 L. R. C. P.*, 56; *1 L. R. Pro. & Div.*, 483; *2 Ib.*, 230.

In Brightly's Dig., 1486, cited on the other side, there is a citation just below in our favor.

JAMES, J., now, (January 12th, 1878,) delivered the judgment of the Court:—

This was an action brought by the plaintiff, who is a trader at Arichat, against the defendants who are merchants at Montreal, for damages for not delivering to the plaintiff at

Arichat certain goods which he alleged were bargained and sold by the defendants to him, and which they contracted to deliver to him at Arichat. It was tried before Judge McDONALD at Arichat, in June term, 1876, and a verdict found for plaintiff.

The defendant, by his fifth plea, sets up an estoppel by a judgment recovered by the now defendants against the now plaintiff, in respect of the same goods in which the now plaintiff who was defendant in that action set up as a defence that they agreed to deliver the goods to him at Arichat, but did not do so, which issue was found against him. This plea also sets up the pleadings in the former action, and avers identity of the causes of action. The sixth plea also sets up estoppel; it is essentially the same as the fifth plea, and avers that the plaintiff had an opportunity of establishing as a defence to the other action the causes of action alleged in his declaration, but wholly failed to do so.

To these pleas there were several replications, among other things attacking the former record, denying the identity of the facts in dispute in the two actions, alleging that the former action was for a debt and this for unliquidated damages, that the defendant (now plaintiff) did not appear at the former trial and did not contest the suit, that he had no opportunity and did not offer evidence at the former trial; and, on equitable grounds, that the judgment in said former action was recovered without his having an opportunity of substantiating by testimony on said trial his said defence, and that no evidence was given by him or his witness on said trial, and that he was prevented by unforeseen causes from being present at such trial, and that therefore, in Equity, he ought not to be estopped from maintaining his present action. There were several other replications, fourteen in all, but those which are material to the opinion I have formed on the case have been enumerated. The verdict was for the plaintiff for the value of the goods and twenty-five per cent. additional for damages.

The former suit was brought for the price and value of goods sold and delivered by the plaintiff (now defendant) to the defendant (now plaintiff,) and judgment was recovered and entered of record for the plaintiff (now defendant) upon a special plea of the present plaintiff, denying the delivery of the

goods. The same defendant now appears as plaintiff, claiming damages from the now defendant for the non-delivery of the same identical goods, to which the defendant pleads the former judgment as an estoppel.

It would be a waste of time to attempt to shew from the record and the evidence that the cause of action in the two suits,—the one for goods sold and delivered, and the other for non-delivery of the same goods,—were identical. The fact of the identity of the two issues is proved not merely by an inspection of the pleadings but by the very explicit evidence of the present plaintiff at the trial, and the only questions appear to be whether the plaintiff's not having contested the former action, is a sufficient reason either at Law or in Equity for preventing the former judgment from operating as an estoppel in the present suit.

It appears by the evidence that he wished and fully intended to contest the suit, but that having attended the Court for that purpose, and finding the case not likely, as his Counsel advised him, to be called for some time, he returned to his home and failed to be present with his witnesses when the cause was called for trial; whereupon judgment was given against him by default. It is for this reason, among others, viz.: that he failed in making a defence to the former action, that he now questions the applicability of the general and and well defined rule. But his laches in not persisting in his defence is no answer to the plea. A judgment by default is as conclusive as if a trial had been held and a verdict given against him. *Howlett* v. *Tarte*, 10 C. B., N. S., 813.

It was contended on the argument that the merits of the case on the evidence were with the plaintiff. This is by no means clear. There was a conflict of testimony on this part of the case which, as far as this point is concerned, was properly left to the jury. Whether their finding was right or not it is unnecessary to enquire, if I am right in the opinion that the estoppel is this case is conclusive. Whatever be the merits as between the parties, it is necessary that there should be some means provided by the law to put an end to litigation between the same parties on the same points of controversy; and our law provides, "that the judgment of a Court of concurrent jurisdiction," (and *a fortiori* of the same Court,) on a

point directly at issue between them is, as a plea in bar or as evidence, conclusive, between the same parties upon the same matter directly in question in another, (and *a fortiori* in the same) Court. *(Opinion of the Judges in the Duchess of Kingston's case,* 2 Smith's L. C, 610.) The editor of this valuable work remarks in his notes on the case, p. 617; "Notwithstanding the unpromising nature of the word 'estoppel,' it is in no wise unjust or unreasonable. * * * * If matters which have once been solemnly decided were to be drawn again into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion, * * * and probably no code, however rude, ever existed without some such provision."

The only questions to be considered as to the operation of the rule at common law, are:—

First. Is it a record of the same Court or another Court of concurrent jurisdiction?

Secondly. Is it between the same parties, or between third persons claiming under the same parties?

Thirdly. Is the issue decided against the plaintiff in the former suit identical with some proposition, without the establishment of which he cannot succeed in the present suit?

And these three questions being answered in the affirmative, the estoppel is established.

In this case the issue was between the same parties, in the same Court, and upon precisely the same question, *i. e.*, were the goods in question delivered to the plaintiff or not? Not only could the now defendant not have recovered in the former action on the usual general plea of denial, had this element in his case been wanting, but the non-delivery was specially pleaded. This issue, it appears of record, was found against the plaintiff, and he now comes in and endeavors to hold the defendant liable for the non-delivery of the goods. He cannot succeed if the goods were delivered to him, and the record in the former action shews conclusively that they were.

The numerous cases cited for the plaintiff are all distinguishable from the present in various particulars, but all of

them uphold in fact the rule. It is not necessary to go into a lengthy discussion of these cases, all of which I have examined, to prove the above proposition. The rule is thus laid down in Smith's L. C., 627, as the result of all the authorities; "It need hardly be remarked that the effect of verdicts, whether upon parties or privies, *altogether* depends on the question *whether the same point was in issue.*" And *Bigelow*, p. 32, after reviewing both the English and the American decisions, says; "The result of the cases on this branch of the subject is that a former judgment between the parties can only be pleaded as an estoppel in cases *founded upon the same cause of action.*" In *Marriott* v. *Hampden*, 7 T. R., 269, which was an action brought to recover back money paid under a judgment by reason of the subsequent discovery of evidence, Lord KENYON said, "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest after a recovery by process of law. There must be an end of litigation. I cannot, therefore, consent even to grant a rule to shew cause, lest it should seem to imply a doubt."

And because the precise point was in issue under formal pleadings, which cannot be misinterpreted or misunderstood, and was the real and substantial point in issue in both cases, I apprehend that no case can be found in the books to prevent the operation of the rule in this instance. Such a decision would be impossible, because it would strike at the whole doctrine. If there be not an estoppel in this case, it is impossible there can be in any case.

It was contended on the argument that the former action being for the price only, and this for damages in addition, the verdict may be sustained, if not to recover back the price of the goods, at least for the damages allowed by the jury over and above the price. This contention has some apparent, but only apparent colour, from the case *Mondel* v. *Steel*, 8 M. & W., 858. In that case the plaintiff sued the defendant for damages for not building a ship according to contract. The defendant pleaded that he had sued the plaintiff for the balance of the price of the vessel, and that a small balance was found due to the now defendant, but that the then defendant, the owner of the ship, had set up by way of defence the

breach of contract on which he now declared; and the jury, under the direction of the presiding judge, found that the now plaintiff, the owner, was entitled to some allowance for defects in the construction, and allowed him therefor, but not sufficient to balance the claim of the then plaintiff, which was accordingly reduced by the jury. The Court, on demurrer to this plea, held that the defendant in the former action (now plaintiff) was not entitled to be allowed the whole amount of damages due to him.

"PARKE, B.—'All that the plaintiff could by law be allowed in diminution of damages, was a deduction from the agreed price according to the difference between the price of the ship as she was and as she ought to have been, according to the contract. All claim for damages beyond that on account of the *subsequent necessity for more extensive repairs*, could not have been allowed in the former action, and may now be recovered.'" And therefore the plea of estoppel was held bad. It was in that case quite consistent with the facts pleaded that there should be damages due to the plaintiff which the jury could not allow him in the former action. In this case the judgment in the former action was utterly inconsistent with the plaintiff's claim for any damages whatever.

But it is urged that the fact that the plaintiff intended, and wished to defend the former action, but was prevented by "unforeseen circumstances" from doing so, is a sufficient answer to the estoppel; and this is pleaded on equitable grounds as a replication to the plea of estoppel. The plea does not set out the special circumstances, as it should have done. If it were otherwise sufficient, or an amendment might be allowed, this defect in the plea might be aided by the verdict. The statute which authorizes equitable pleas at common law, (R. S., p. 469, sec. 162,) enacts, that "it shall be lawful for the plaintiff in replevin, or the defendant in any cause in the Supreme Court, in which if judgment were obtained he would have been entitled to relief on equitable grounds to plead the facts which entitle him to such relief."

This statute affords a distinct and conclusive answer to this replication. It would be a new thing indeed to see a party going to the Court of Equity to get rid of a judgment duly

and regularly obtained against him in this Court, on the ground that he had suffered the recovery against him by his own laches.

The rule for a new trial must in my opinion be made absolute, with costs, and as it is obvious that the plaintiff cannot succeed in this action in the face of the former record, I hope it will not again be brought to trial.

Rule absolute, with costs.

FARRELL *v.* McLAREN.

PLAINTIFF, who at the time was visiting surgeon of the City Hospital, performed a surgical operation upon the deceased, of whose estate defendant was administratrix. Dr. McFatridge had been attending deceased in his illness, with Dr. Parker as consulting physician. The latter advised the deceased to have the operation performed in the hospital, telling him that Plaintiff, as house surgeon for the time, would perform the operation, and he, Parker, would assist. Deceased assented to the operation being performed by the plaintiff, and it was performed successfully. *Held* that although the hospital was primarily an eleemosynary institution, yet as there was no by-law prohibiting the house surgeon from charging for services rendered to patients able to pay, and who resorted to the institution for the sake of better attendance, &c., plaintiff could recover on an implied assumpsit.

This was an action brought in the County Court for the County of Halifax by the plaintiff, a surgeon, practising his profession in the city of Halifax, against the defendant as administratrix, for an amount claimed for a surgical operation upon the deceased. The operation was performed in the City Hospital by the attending surgeon, and defendant contended that there should have been no charge, as the institution was an eleemosynary one. The decision of JOHNSTONE, J., of the County Court, was in favour of the plaintiff, and this decision was appealed from and argued during the present term.

McDonald, Q. C., for appellant.—Dr. Parker was the medical attendant. Deceased had cancer of the tongue. Dr. Parker said he would have to go to the hospital, and he agreed to go, provided that Dr. Parker would be there. As a matter of courtesy the surgeon for the quarter performs the operation in the presence of the other surgeons. I appeal on the ground that there was no privity of contract. There were four surgeons, attending three months each. This was Dr. Farrell's quarter. The deceased was Dr. McFatridge's patient, with Dr. Parker as consulting physician. There was no promise

expressed or implied. For their own reasons these surgeons gave their services, whether to promote their education, or otherwise; and their services, unless specially agreed upon, were to be *gratis*. The man himself wanted Dr. Parker to perform the operation in his own house. He recommended him to go to the hospital. The patient still declined to go unless Parker would be present. There is no pretence that the man ever agreed or expected to pay Dr. Farrell. Dr. Parker rendered his bill against him for all except the operation. He went into that institution by the advice of his medical adviser, and without the intention to employ Dr. Farrell.

(YOUNG, C. J.—He assented to Farrell's performing the operation, on Dr. Parker assuring him that he would be as safe in Farrell's hands as in his own.)

The consent to Farrell's performing the operation would imply a contract, were it not that the circumstances show that there was no consenting mind to a contract to pay for the services. The circumstances raised the inference, on the contrary, that the service was to be gratuitous. The circumstance that Dr. Parker told him he should go to hospital for the sake of regular attendance, shows that he was a patient unable to pay for regular attendance.

Thompson, contra.—Deceased was ill of cancer in the tongue, to such an extent that an operation was the only chance of life. Dr. McFatridge was his physician, and Dr. Parker consulting. When he advised this operation he took into consideration his circumstances, and considering the appliances so much better at the hospital, he sent him there. It is admitted that if Dr. Parker had performed the operation he could charge for it. The question arose who would perform it. The patient was informed that Farrell would do it, and it was done. Deceased knew that the operation would be performed by Farrell, assented to his doing it, and having the means to pay, is removed from the category of those who would be expected to receive gratuitous services. *City Charter*, 163, 170. (Refers to the character of the hospital, to rebut the argument that this is a public institution where parties should receive gratuitous attention.) He would have had to pay had Parker done

it, or had Farrell done it elsewhere. Why should it be different, having it done here with better care and attendance? The services were necessary to be performed. He assented to their being performed, knew Farrell was to perform them, and is shown to be able to pay for them; so that all the elements of a contract exist. *Gibbon* v. *Budd*, 2 H. & C., 92. The Registration Act not only removes the difficulty as to *honorarium*, but reverses the presumption. Before the statute it was presumed that a physician practised for an *honorarium*. POLLOCK, C. B., says, in the case cited, that the presumption is not only removed but reversed, and that the fact of services being performed raises a presumption that they are to be paid for. If the physicians are liable for mal-practice, surely it is only fair that the patient should pay where there is ability to pay, and he only goes there for better attendance, and gets it cheaper than he could at home. Cites 4 F. & F., 977, as to liability for mal-practice.

In view of the gratuitous services given to paupers, the doctors should not be expected to give their services gratuitously to persons able to pay, and who would have had to pay had the operation been performed outside.

McDonald, Q. C.—Cites City Charter, sec. 204, 573. The hospital is a public institution: sec. 574. The Commissioners have the power to control and manage the institution; the Court is not to allow the medical men to establish a rule for the institution. A implied assumpsit is raised on the hardship of expecting gratuitous services. He has to pay Dr. Parker, his consulting physician. If he has to pay Farrell, why should he not pay the other doctors in attendance? They all have as good a right to be paid, and would be paid, if it were an operation performed in the usual course in a private house. If Farrell was his agent to perform the operation he could call in the others to assist, and if a contract is implied at all it would extend to them.

DESBARRES, J., now, (January 12th, 1878), delivered the judgment of the Court:—

This was an appeal from the County Court for District Number One, in which the learned Judge of that Court, on a trial had before him, gave judgment in favor of the plaintiff,

for the amount claimed for a surgical operation performed by him on the person of William McLaren, the husband of the defendant. It appears from the Judge's report that the plaintiff, in November, 1871, was the attending house surgeon in the City Hospital, and while he was acting in that capacity, William McLaren, suffering from a cancer on the tongue, was allowed to enter and become an inmate of that institution, for the purpose of undergoing the operation of cutting out the cancer, which was performed by the plaintiff as the attending surgeon at the time. For that service and attendance on the patient, the plaintiff charged and was allowed $80 by the Judge, who tried the cause without a jury. The defendant denies her liability, and resists the payment of the plaintiff's claim, on the ground that there was no contract between the plaintiff and the deceased, and no promise by the latter, express or implied, to pay anything for services and attendance given at the institution, beyond the sum of $5 per week, which was charged by the authorities and paid by him as a boarded patient, entitled to receive the ordinary nursing and medical attendance, &c., provided there. The plaintiff, on the other hand, contends that while it was his duty as the house surgeon of the hospital, during his term of service, to give his professional attendance to, and perform surgical operations upon all pauper patients in the institution gratuitously, he was under no obligation to perform a difficult surgical operation on the deceased, who, having the means of paying, was allowed to enter the hospital for the express purpose of having it performed there on account of the more skilful nursing and better attendance provided there than he could possibly have received in his own house,—drawing a distinction between pauper and paying patients well worthy of consideration. It has not been the practice of any surgeon or physician connected with the hospital, to make any charge for professional services rendered to its inmates. There appears to be but one case since that humane and useful institution has been established, in which any charge was ever made to an inmate, and that was a case in which it was expressly stipulated between the attending surgeon and the patient, who had the ability to pay, that the former was to be paid for his professional services. There was, it was true, no express agreement or understanding

between the plaintiff and the defendant in this case, that the former was to be paid for his professional services, but there is evidence upon which an implied promise to pay may be inferred. It appears from the testimony of Dr. Parker, one of the Commissioners of the hospital, and consulting physician and surgeon, that before entering the hospital, McLaren, the deceased. applied to him to perform the operation at his own house. The case being a very serious one, Dr. Parker declined, telling him that there was an hospital, meaning, I presume, that he considered that the fittest place, as constant medical attendance would be necessary, which he probably thought could not be given elsewhere. He told McLaren the plaintiff would be the operating surgeon, and that he, Dr. Parker, would assist him. McLaren afterwards went to the hospital, and the operation was there performed by the plaintiff. It was, he says, a difficult and dangerous one, upon which the life of the patient depended. Dr. Parker further says he was present when the plaintiff spoke to McLaren on the subject of the operation, and he assented to it. It was, as he says, successful, and relieved the deceased for the time being. The operation having then been performed, with the assent of the deceased, to whom relief was thereby given, a promise to pay was necessarily to be implied, for the enforcement of which an action could be maintained, unless the plaintiff was prohibited by some ordinance or by-law of the institution, from making a charge, which he was bound to observe. I have read the printed rules furnished us for the regulation of the hospital, and find there is nothing in them prohibiting the attending surgeon from charging for professional services rendered to persons admitted therein, having the ability to pay, who are induced to go there from the advantages it possesses and the certainty of receiving better attendance than can otherwise be provided. The institution was established for the relief of the poorer classes to whom professional services are willingly rendered gratuitously, but where persons owning property and having the means of supporting themselves are permitted to enter there, as the late William McLaren did, for the purpose of having a difficult operation performed, it would seem but right that the visiting surgeon called upon to perform it should be paid for his services. In the absence of any rule or regu-

lation prohibiting the plaintiff, as such visiting surgeon, from making any charge to a person admitted to the hospital as the deceased was, I think the plaintiff in this case is entitled to recover from the defendant, as the administratrix of the estate of the deceased, and that the judgment of the learned Judge of the County Court must be upheld.

In *Gibbon* v. *Budd*, 2 H. & C., 92, an action was brought by plaintiff, a member of the Royal College of Physicians, to recover for professional visits alleged to have been paid by him to the deceased, in which the defence was that if the visits had been paid at all they were of a purely friendly character and in no way professional. It was also contended, as a matter of law, that even if the visits had been paid as ordinary professional visits, inasmuch as there was no evidence of an express contract, the action was not maintainable. The learned Judge left to the jury the question whether the plaintiff did, as he contended, attend the deceased as a physician, or as defendant contended, did not attend the deceased at all, or not in a professional character, and the jury found a verdict for the plaintiff. A rule *nisi* was obtained, on the ground that a physician, as such, cannot recover fees for advice, without a a special contract, and that there was no evidence of such a contract. POLLOCK, B., said, "The jury have found that the plaintiff was not practising gratuitously, as a friend, but professionally, in expectation of a fee. Undoubtedly the general understanding formerly was that a physician practised in expectation of an *honorarium*, not of a *remuneration* which he could demand as a legal right. The presumption was that the practice was in this sense gratuitous. This presumption is now reversed. A physician registered under the Medical Act is, in the absence of a distinct understanding to the contrary, entitled to be paid for professional practice, if not restrained by a by-law of the College of Physicians." Now, as the Judge who tried this cause, acting as he did both as judge and juror, has, upon the evidence produced before him, found, as I think he was well warranted in finding, that the plaintiff in performing the operation on the deceased, was not acting gratuitously, but in expectation of being remunerated by him, there being no regulation or by-law of the institution prohibiting the performance of the services for reward, I

think there is no ground for reversing the judgment of the learned Judge of the County Court, and that the appeal must be dismissed with costs.

JAMES, J.—This is an appeal from a decision of the County Court Judge for Halifax, in favor of the plaintiff, in an action for the value of his professional services in performing a surgical operation upon the intestate, the action being brought against the defendant as his administratrix. The disease under which he labored was cancer in the tongue, and its removal, an operation of difficulty, and attended with danger to life, is admitted to have been performed with due surgical skill, and the amount charged is proved to be not at all excessive.

There was no express contract proved that the plaintiff should be remunerated for this important service. The facts which I have stated, however, constitute an ample foundation for an implied contract of remuneration, and this implication must prevail, unless, as is contended by defendant's counsel, there are facts in the case which rebut the presumption. The facts are substantially as follows:—The deceased was being treated for his disease by his visiting physician, Dr. McFatridge, and his consulting physician, Dr. Parker, by whom he was advised that a surgical operation was necessary, and who urged him, contrary to his inclination, to have the operation performed at the City Hospital by the plaintiff who was one of the visiting surgeons. Their object in giving this advice, and his in accepting it, was, not the saving of expense, but in order that he might enjoy the benefit of the careful, continuous and skilled attendance absolutely necessary to a person subjected to a very dangerous surgical operation, which he might there obtain much more perfectly than he possibly could at his own home, and at a very moderate expense.

The City Hospital, in its primary character, is undoubtedly an eleemosynary institution, but by no means exclusively so. The rules by which it is governed permit its use by others than those for whose benefit it was principally intended, at a stated rate of $5 per week for board and attendance, and, as appears by the evidence, which the County Judge has affirmed by his decision, no additional charge is made in ordinary cases for

medical attendance, this being provided *gratis* by the house surgeon and the medical practitioners, who in turn visit the hospital. There is nothing in the evidence to lead us to the conclusion that these gentlemen, whose whole attention is entirely gratuitous, are under any personal obligation thus to devote their time and talents to the carrying on of a public institution, however benevolent in its nature; still less that they are to be expected to perform difficult and dangerous operations, requiring the highest skill and involving grave responsibility, not only without pecuniary remuneration, but without thanks.

I believe it has never been laid to the charge of our cousins, the disciples of Galen and Æsculapius, that they are in the habit of refusing their professional services to those who are unable to remunerate them; but in those cases they are entitled to, and doubtless receive the grateful thanks of the recipient of these priceless favors. But in this instance it appears they are expected to perform these services as public servants, and if they are under obligation to do this of course they are not entitled even to thanks.

In this case, had the hospital not been open to the patient, who was by no means a pauper but the owner of real estate, he would, of course, have been bound, as doubtless he would have been willing, to pay for the services rendered; and since there is no rule of the institution forbidding the visiting physicians, when introducing their patients to its benefits, to charge for their services while there, as they might otherwise have done, I can see nothing to rebut the implied obligation arising upon the special circumstances of the case, to pay for the services,—arising from their performance on the one hand and acceptance on the other.

In conclusion, I may remark that the rule of the institution which permits others than paupers to enjoy its benefits is, in my opinion, not only humane, but advantageous to the public as well as to the patients. There are many persons in a large city who, although quite able to pay for these privileges, are without homes in the city where they can obtain suitable care and attention, and, on the other hand, the revenue thus derived tends to reduce the public taxation necessary for the support of the institution. Were we to decide that the

visiting physicians should be compelled to keep their patients at their homes or hotels, or else perform duties to them at the hospitals gratuitously, these patients would not be sent there, and perhaps the medical gentlemen would refuse their gratuitous attendance, as I think they reasonably might under such circumstances. I can conceive no better use to which the spare beds in the institution and the spare time of its paid employes can be devoted, so long as its appliances are in excess of what is needed for the indigent, than to use them just as they have been used in this instance. Should different circumstances arise, we may safely leave it to the City Fathers to make such rules as may become necessary, either by enlarging the premises, or restricting its benefits to the pauper population, and providing a separate institution for the stranger and the homeless citizen. The public hospital is the only refuge provided for them as yet. This Court cannot make rules for its guidance,—our duty is to leave this task in better hands, where it is already placed by law; we have only to administer the law as we find it. I think the appeal should be discharged.

SIR WILLIAM YOUNG, C. J., said he assented to the judgment below, on the ground that the deceased had employed Dr. Parker, whom of course he intended to pay, and that Dr. Parker had called in the plaintiff with the consent of the deceased. He held that a patient could not be called upon to pay for services rendered in the hospital, unless he consented, but here there was a consent.

McCABE *v.* McKAY.

THE County Court Judge refused to allow plaintiff, after the expiration of thirty days from the filing of defendant's plea of payment into Court, to reply that the amount paid was insufficient. Defendant appealed under the County Court Amendment Act of 1877.

Held, that the rule had been wrongly refused, and, further, that as the refusal to allow a replication was decisive against the plaintiff's claim, and therefore a final judgment, it could be appealed from.

The provisions of the County Court Act of 1877, as to appeal, supersede altogether those of 1874.

This was an appeal from a judgment of the County Court sitting at Pictou. The judgment, which was for the defendant, was based upon the ground that the plaintiff could not

reply to a plea of payment into Court, after thirty days from the filing of the plea, that the amount so paid in was insufficient.

The cause was argued before the full Court, December 18th, 1877.

Rigby, Q. C., in support of the appeal.—The judgment is based on section 170 of Cap. 94, R. S., allowing the plaintiff to reply to a plea of payment into Court, that the amount so paid is not enough to satisfy the claim; but that section is controlled by section 142, which provides that where the plaintiff shall not reply within thirty days, he shall be taken to have denied the facts alleged in the plea, but that the Court or a Judge may give leave to reply after the expiration of thirty days.

The ground may be taken that an appeal is not allowable here, as this is a question of pleading. L. R., Ch. Div. for July, 1877, p. 284, shews that an appeal is allowed even on a question of costs, where a principle of law is involved. Sections 51 and 53, chapter 18 of the Acts of 1874, give an appeal from the decision or finding of the judge or the finding of a jury in the County Court in all cases where either party is aggrieved. Chapter 6 of the Acts of 1877 provides more fully for the appeal in cases where the judgment is for $40 or more where the judge refuses it. In England an appeal lies from the County Court where the claim is above twenty pounds, even if the finding is for a less amount; *9 Exch.*, 485; *4 El. & Bl.*, 655. Section 53 of the Act of 1874, is not repealed, and it places no limit upon the amount.

Mr. Henry, for respondent, was absent.

Sir William Young, C. J., now, (January 12th, 1878,) delivered the judgment of the Court:—

In this cause the defendant pleaded payment of money into Court, to which the plaintiff did not reply within thirty days. Section 142 of the Practice Act provides that in all cases the plaintiff may reply without the leave of the Court or a Judge, and that where the plaintiff shall not reply before trial, or within thirty days after the service of the pleas, he shall be taken to have denied the facts alleged therein; but the Court or a Judge may give leave to reply after the expiration

of the thirty days. The County Court Judge unwillingly refused to allow the replication, and therefore the plaintiff was shut out of his suit. We think the rule was wrongly refused.

The next question that arises is whether this is a matter for appeal. Mr. Rigby argued that the appealing clauses in the original County Court Act are still in force. Section 51 of the Act of 1874, provides that the decision of the presiding Judge shall be subject to an appeal to the Supreme Court, in all cases between forty and eighty dollars, upon the appellant giving a bond, as provided in section 53. This would seem to shut out appeals in causes over eighty dollars, but section 53 goes on to provide that in case any party in a cause in any of such Courts is dissatisfied with the decision of the Judge upon any point of law or fact, or with the finding of the jury on any fact left to them, or with decisions upon motions for nonsuit, or in arrest of judgment, he may appeal to the Supreme Court, and the Judge shall stay the proceedings until judgment be given on the appeal, provided the party wishing to appeal shall give a bond, etc. That section gives an appeal from an interlocutory judgment, which is foreign to our practice. In the Equity Court you cannot appeal from an interlocutory judgment. Therefore, I think the provisions in the Act of 1877 are infinitely better, and supersede altogether those in the Act of 1874. Section 25 of this Act provides that in case either party in a cause in such courts where the judgment obtained is over forty dollars, shall be dissatisfied with the decision of the Judge upon any point of law, or with the charge to the jury where any fact or facts is or are left to a jury, or with his decision upon motion for a nonsuit or new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, or upon the admission or rejection of evidence, he may apply to the Judge who tried the cause, for a rule granting him leave to appeal to the Supreme Court, which said rule shall state the objections or grounds of appeal, and which said rule the Judge shall in his discretion grant or refuse. The next section (26) provides that where the Judge shall refuse to grant such a rule, and the counsel of the party desiring to appeal shall, on or before the last day of the sittings at which the cause has been tried, or such extended time as the Judge

shall allow, file a bond to the other side to respond the judgment, should the appeal be dismissed, no judgment shall be entered up, but a rule stating the objections or grounds of appeal shall pass. It would appear from these clauses that where the appeal is taken out under the statute, upon filing a bond, a stay of proceedings is allowed, but where the rule is granted by the Judge under section 25, no stay of proceedings is provided for. The omission is a singular one, and I presume that some modification would be advisable. The question for us now, under the Act of 1877, is whether the decision of the Judge below is one that can be appealed from. We think it is, for the omission to file a replication is decisive against the plaintiff's claim. It is a final judgment, and therefore we uphold the appeal, but without costs.

KIELEY *v.* THOMPSON.

THE deceased husband of plaintiff occupied land under an agreement to purchase, which was not shown to have ripened into a title, and was not signed or shown to have been ratified or acted upon by the parties having the legal title to the land. Plaintiff brought action for dower against the defendant, who held possession, which was not shown to have been wrongful, but failed to identify the land of which her husband had had possession, as the lot described in the writ.

Verdict for defendant sustained.

This was an action for dower, to which four pleas were pleaded, but the defence relied on was that the plaintiff was not dowable in the lands mentioned in the writ, as her deceased husband never had a legal title to them. The cause was tried before Mr. Justice DESBARRES, at Windsor. A verdict was found for defendant, and a rule *nisi* granted by the Judge to set the verdict aside, on the grounds that it was against law and evidence, and for misdirection. The rule was argued before YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J., December 14th., 1877.

Johnstone, Q. C., in support of rule.—There was seizin in fact of the lands by the husband; seizin in law is therefore to be presumed. After the husband's death the widow and children remained in possession, *Parke on Dower*, 2, 37. Kieley, deceased, was on the land twenty-three years, a length of

occupation sufficient to give him title. But, to shew that he had a right, a deed was put in, a fact not diminishing or destroying the effect of his long possession. It is true the deed, or whatever the document is held to be, does not contain the word convey, but it contains the word "purchased," and recites the payment of the purchase-money.

Actual possession is *prima facie* evidence of seizure; *5 Taunt.*, 326; *Co. Lit.*, 15 a. After twenty years possession livery of seizin may be presumed; *Cole on Ejectment*, 312; *13 Q. B.*, 945. Cites also, *1 L. R., Q B.*, 1; *Roscoe*, (11 ed.) 614; *Allen* v. *Rimingstone*, 2 Saund, 111; *1 A. & E.*, 119; *M. & M.*, 346; *1 H. & N.*, 744.

It must be admitted if we had not put in this deed we had a perfect title by possession. The deed was put in to shew that the man was not a mere squatter. It is laid down in some of the authorities cited that the fact of the demandant attempting to put in a documentary title, and failing, does not prejudice the title based on possession.

Cites *1 Washb.*, 59; *5 Metc.*, 173; *1 Washb.*, 218; *4 Dane's Abridg.*, 668. The wife may claim and maintain dower so long as the seizin under which she claims is undisturbed; *1 Jar. on Wills*; *Parke on Dower*, 50. A mere claim of ownership, with possession by a husband, will support a widow's claim of dower until a better title is set up. *1 Washb.*, 235, and cases there cited; *4 Mass. R.*, 408; *10 Barbour*, 454.

His Lordship, under these authorities, should have instructed the jury that the claim of dower was made out. The verdict is clearly against law.

Meagher, contra.—There is no proof when the husband died; there is no proof that the defendant is tenant of the freehold. They have not proved therefore that the defendant is a party against whom plaintiff can claim dower. The possession which plaintiff had is not proved to have been adverse to the Tobins. The paper called a deed, put in from the Tobins, shews that the husband held under the Tobins. There is no proof that the husband ever claimed ownership. On the page of Washb., (235) cited, it is stated to have been held in Maine, that if the husband, claiming title, is shewn to have occupied under an agreement to purchase, the widow is not dowable.

If occupation under an agreement to purchase by the husband will make the widow dowable, the Tobins might have conveyed subsequently the title to a third party, so that the title would be altogether out of the husband, and the wife would still have a right of dower, under the contention of the plaintiff's counsel. There is no satisfactory proof of description of the land. The plaintiff cannot blow hot and cold. The bill of sale of the property was made in 1843, and it does not appear but that the husband died in 1850. It may be presumed that if the money was paid, a deed would have been given. It is a fair presumption that the husband held during the rest of his life under the Tobins. In a case in *9 Metc.*, 418, it is held that entry with permission of owner will never give seizin without acts of disseizin known to the owner. Cites R. S., p. 567.

Johnstone, Q. C., in reply.—A demand of dower is proved to have been made upon defendant, to which he made no answer. He has pleaded to the writ, but shewn nothing in his pleas or in his evidence proving him not to be the party to assign dower to the plaintiff. The Court should be satisfied with a *prima facie* case on the part of plaintiff, and not search for flaws in that case. The deed put in evidence proved that the money was paid for the property. Cites *3 Comyn's Dig.*, 573; *7 Gray's Mass. Rep.*, 553; *3 Sanf. Ch. Rep.*, 333; *Washb.*, 165.

McDONALD, J., now, (January 12th, 1878,) delivered the judgment of the Court:—

Under the evidence in this cause, I think that the verdict cannot be disturbed, the plaintiff having failed to prove his case in several essential particulars. Even if the possession of her deceased husband had been sufficient to give her a right to dower in the land occupied by him, she has entirely failed to identify that land as the lot described in the writ of dower. Our statute gives a widow the right to recover, in this court, her dower from "the heir or other person having the freehold;" but here again the plaintiff has failed to prove that the defendant is either the heir or the person having the freehold. It was said at the argument that even a tortious occupation by the husband gives the widow a right to dower, and no

doubt that is true in one sense, but it is quite clear that the right does not exist as against the rightful owner. It would be too much to expect that the widow of a trespasser, dying in possession of lands, could, by reason of the very act that made the husband a trespasser, successfully claim dower against the rightful owner, even though her claim might, and, as I think, would be good as against the heir of her husband, if he held the possession and claimed as such.

The bill of sale put in evidence shows that the husband occupied simply under an agreement to purchase, which agreement is not shown to have ripened into a title. It was not signed by the Tobins', who had a legal title to the land; and in the absence of proof that they ratified it or acted upon it, neither they nor anyone claiming under them would be bound by it. But it *is* good evidence against the plaintiff, whose husband did sign it, and who now produces it. The legal title to the land is proved to be out of the deceased Kiely, and the defendant's possession, which is not shown to be wrongful, presupposes a good title in him.

Many cases were cited on behalf of the plaintiff, which, no doubt, were properly decided under the facts there in evidence, but we are now dealing with one in which the plaintiff failed to prove the facts necessary to bring it within the legal principles laid down in the cases cited.

IN RE SUTHERLAND.

WHERE the Judge of the County Court for District No. 2, Lunenburg, &c., passed two orders, one postponing a meeting of creditors called to consider an offer of composition and ordering the assignee to retain the estate until discharge applied for, and the other ordering a meeting to be held at Halifax, the Court, holding that the Judge could not order such meeting out of his own jurisdiction, set aside both orders, as both had a common object, and directed the costs of the appeal to be paid out of the estate.

THIS matter came before the Court on appeal from two orders in insolvency made by DESBRISAY, J., of the County Court for District No. 2, the one postponing to December 27th, 1876, a meeting called for November 17th, to consider the insolvent's offer of composition, the assignee in the mean-

time to retain possession of the estate, and the other calling a meeting of creditors at Halifax, on the 20th of December, and requiring the insolvent to attend for the purpose of being examined.

Meagher, for appellant.—The first order is that the estate be retained. First the Judge postpones the meeting, and directs that the assignee shall retain the funds of the estate till the insolvent gets his discharge. The creditors have the power of dealing with the assets in such way as they please, by a majority in number and value. The Judge takes away that power without notice to anybody, and without any grounds being shown in the petition for the order. The great bulk of the creditors live in Shelburne, and they are required to come to Halifax to suit the whim of one creditor in Halifax. By another order he requires the insolvent to come here to be examined.

Creditors to the amount of $24,000 against less than $5000, voted to accept a composition, secured, of thirty-three and a third cents. The meeting which the Judge undertook to postpone was the meeting called under the statute to consider that composition. The Judge interposed, and passed an order tying up their hands, and directed that the assignee should retain the estate till discharge was applied for. Suppose he never did apply for discharge, then the creditors could never get a dollar.

MCDONALD, J.—Has the Judge power to make such an order? If not, it is unnecessary to go into all the facts.

Meagher.—The first ground I take is that no reasons are given why the meeting should be postponed and the estate left in the hands of the assignee. It is not shown that the composition was too small, or that any advantage was to be gained from the meeting in Halifax.

Judge JOHNSTONE admits he had no power to issue the subpœna. If he had any jurisdiction it would be coextensive with that of Judge DESBRISAY, and conflicting orders might be issued.

The case shows that these Halifax parties were represented at the meeting at Shelburne, and were present by representation when the vote was taken.

I admit that the Judge has power to say where a meeting shall be held; he has not the power to postpone a meeting, and even as to the appointment of a meeting, he cannot direct a meeting to be held out of his jurisdiction. Sec. 60 and 36 of the Insolvent Act of 1875.

The order takes it out of the hands of creditors, and leaves the creditors altogether at the mercy of the insolvent, who may not apply for a discharge.

Cites section 2, sub-section *d*, defining the word, "Judge."

Section 34 gives the creditors power to determine where the meetings shall be held, &c.

This is a meeting imperatively required by the statute, one section of which provides that where an offer of composition is made, a meeting shall be called to take it into consideration. See sec. 37, and *3 DeG., McN. & G.*, 507, as to notice, showing that the majority should govern, and the place where the majority reside should govern. *Rob.*, 807. The English Bankruptcy rules 87 and 88, make special provisions for changing the place of meeting and provide for the expenses. There are no such provisions here. There are no provisions made by these orders for the insolvent's expenses here. *Clarke*, p. 47, sec. 38, notes; *Ex parte Mitchell*, 3 M. D. & DeG.

Hunt, contra.—With reference to expenses, cites *Clarke*, 138, that insolvent is not entitled to claim expenses before being sworn.

The creditors in the city, of whom there are a number, have a right to hear the examination. They are certainly interested in being present and hearing the examination. The people of Halifax are entitled to the same. (McDONALD J.—It is not the amount, but the inconvenience of three or four against the larger number there.) Should not the insolvent be put to the inconvenience of coming here, rather than the creditors of going there?

See sec. 110 and 111 of the Act. The Judge has the power to issue subpœnas *ad testificandum* to any witness within the limits of Canada. If so, he certainly can summon a man from Shelburne to Halifax.

(YOUNG, C. J.—Does not that mean the Court having charge of the estate?)

Sec. 34, shows that the Judge has a power of ordering a meeting "otherwise" than at the office of the assignee.

Suppose a large majority of the creditors reside in Cape Breton, is it not convenient that the insolvent should be examined there?

We had to have the meeting postponed and the matter stayed at once, or else the moment the meeting was held the composition would have been accepted and the estate handed over to the insolvent.

See section 125. The assignee is an officer of the Court and subject to its orders. Sec. 25 and 26.

As to the want of notice, there was no time for the Judge to have made a rule *nisi* or given notice, as the application to him was too close to the date of meeting.

Meagher, in reply.—The Judge below instead of the order he did make, should have simply made an order restraining the meeting for a reasonable time, but I don't hold that he had such power.

Cites *Bump.*, 641.

SIR WILLIAM YOUNG, C. J., now, (January 12th, 1878,) delivered the judgment of the Court:—

This is an appeal from two orders in insolvency made by the County Court Judge of District number Two. The insolvents did business at Shelburne, and at the time of their failure they owed about $30,000, of which $7000 or $8000 was due in Halifax and the rest elsewhere, but chiefly in their own county. On the 5th of October, 1876, a meeting of the creditors was held in Shelburne, at which the Halifax creditors were partly represented, and an offer was made of 33⅓ per cent. on the dollar, payable at six, twelve and eighteen months, with security, which was accepted by a large majority, but most of the Halifax creditors were opposed to it. The assignee then called another meeting of the creditors for the 17th of November, to take into consideration the offer of composition and discharge, and one of the Halifax creditors applied by petition and affidavit to the Judge, and obtained the two orders appealed from, one postponing the meeting until the 27th December, the assignee in the meanwhile retaining possession of the estate and effects of the insolvents, and the

other calling a meeting of the creditors at Halifax on the 20th December, and requiring the insolvents to attend there for the purpose of being examined.

These orders raise the important question whether, under the Act of 1875, a Judge can order such an examination out of his own district and the county where the insolvents reside.

By the English Bankruptcy Act of 1849, sec. 20, it was enacted that the senior Commissioner shall have power, whenever he may deem it expedient, to order any petition against or by any trader to be presented in any district, with or without reference to the district in which the trader shall have resided or carried on business, or, (among other things,) to transfer any petition for ajudication of bankruptcy and the proceedings thereunder, and the prosecution or the further prosecution thereof, from the Court in any one district to the Court in any other district.

These County District Courts, however, were abolished by the Act of 1869. *Robson*, 26.

Now is there any analogous power under our Dominion Act of 1875. By sections 109, 110, 111, the Judge has the same power as the Courts of Record in issuing commissions for the examination of witnesses, and may issue subpœnas commanding the attendance of any person as a witness within the limits of Canada, (which the Supreme Court cannot do,) and all rules, writs, orders and warrants issued by any Court or Judge in any matter or proceeding under the act may be validly served in any part of Canada upon the party affected or to be affected thereby. By sec. 25, the insolvent shall at all times, until he shall have obtained a confirmation of his discharge, be subject to the order of the Court or Judge, and to such other examination as the Judge or other interested parties may require.

But none of these clauses goes the length that is contended for, and there are others having an opposite tendency.

By sec. 2, sub-sec. *d*, the word "Judge" shall mean a judge of the said Courts respectively, having jurisdiction in the county or district where proceedings shall be had under the act. By sec. 34, the creditors may from time to time, at any meeting, determine where subsequent meetings shall be held;

and until they shall have passed a resolution to that effect, all meetings shall be held at the office of the assignee unless otherwise ordered by the Judge.

This order, it seems to me, must be within the limits of his own jurisdiction, otherwise an insolvent might be summoned for examination at his own charge and at a distance from his books and papers to one distant county after another, which has never been the practice, and is not prescribed by the act. Whether a judge can postpone a meeting regularly called, is a point which we need not at present determine. These two orders were framed for a common object and must be set aside.

The appeal therefore is sustained, the costs to be paid out of the estate.

CUTTEN *v.* STEPHENS.

WEMYSS, in an appeal from the County Court, there were no questions of law, and the County Court Judge, acting as both Judge and Jury, discredited the plaintiff's story, and gave judgment for the defendant, the Court dismissed the appeal with costs.*

This was an action of replevin for a horse claimed by the plaintiff, tried in the County Court before JOHNSTONE, J., and in which judgment was given for the defendant upon the weight of evidence. The decision was appealed from, and the cause came on for argument during the present term.

Graham, for appellant, read and proceeded to comment upon the evidence.

YOUNG, C. J.—Can you move on the weight of evidence? Perhaps the Judge below did not believe the testimony of the plaintiff.

Graham.—The Court reviews the judgments of the Probate Court on the facts. So in the Vice-Admiralty. All that I ask here is a judgment on the uncontradicted evidence of the plaintiff. I concede that as to conflicting evidence you may take the judgment of the County Court as final.

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* The case does not establish any general principle but the *dicta* thrown out in the course of the argument are of interest as bearing upon the vexed question as to the powers of the Court in reference to appeals from the County Courts.

YOUNG, C. J.—I should be sorry to hold that the judgment of the County Court as to the facts is conclusive, but I will go this far, that there should be a very strong case to disturb it.

Foster, contra, contended that the Court could not review the decision of the Judge of the County Court, on a question as to the weight of evidence.

YOUNG, C. J.—We think the provisions as to appeal in the Act of 1874, are repealed by those in 1877, that the latter are substituted for the former, and do not include the right to appeal on the ground of weight of evidence.

Graham afterwards pointed out that the writ had been issued before the statute of 1877 passed.

SMITH, J., now, (January 12th, 1878,) delivered the judgment of the Court:—

This is an appeal from the decision of Judge JOHNSTONE in the County Court at Halifax. There are no questions of law in this case; the only point involved is whether the horse replevied by plaintiff and taken out of the possession of the defendant belonged to the plaintiff at that time. I can see no ground for disturbing the decision of the County Court Judge, who discharged in this case the functions of both Judge and Jury. The testimony given by the plaintiff in reference to his property in the horse is, certainly, most strikingly inconsistent with his entire conduct, and I am not at all surprised that the learned Judge discredited the plaintiff's story, and refused to deprive the defendant of the horse acquired by him openly and for a valuable consideration.

I think the appeal must be dismissed with costs.

HARVIE *v.* McKAY.

WHERE the venue, originally laid at Halifax, was changed to Sydney, C. B., by rule made absolute on the Tuesday next preceding the Tuesday on which the October Term opened at Sydney, but not served until the following day, and the plaintiff did not proceed to trial at the October term, but tried his cause without notice at the June term thereafter, and obtained judgment, the defendant not appearing, the Court set aside the judgment, without costs.

THIS was a summary cause, in which the venue was laid at Halifax, but defendant obtained a rule absolute to change the venue to Sydney, C. B. The term opened at Sydney on

Tuesday, the 3rd of October, and the rule absolute to change the venue was obtained on the preceding Tuesday, September 26th, but was not served until the following day. Plaintiff did not proceed to try his cause at the October term, but without serving any notice of trial on the defendant, proceeded to trial at the following June term at Sydney, and obtained judgment, the defendant not appearing. A rule *nisi* was taken to set the judgment aside, which, now, (January 17th, 1878,) came on for argument.

Bligh, for rule.—The plaintiff gave no notice of trial for the June term. Even admitting that no notice of trial was required for the October term, which was the first term at which the cause could be tried, that is simply by the practice of the Court. There is nothing in the statute upon the point. That practice has not extended in any one instance to a case where the venue has been changed. Even if no notice of trial was required in the first instance, that is for the October term, it was required for the June term. There was only an interval of a week between the change of venue and the first term thereafter, but it was the first term, nevertheless, and the term at which this was tried was the second term.

Frith, contra.—The question is whether this was a continued cause, and whether the June term was the first or the second term at which the cause could be tried. The rule to change the venue was not served until the Wednesday next preceding the Tuesday on which the October term opened at Sydney.

McDONALD, J.—The causes are not required to be put on the docket until the Saturday before the opening of the term. SMITH, J.—That is the practice, but the statute makes no distinction. DES BARRES, J.—The defendant could not object to its being put upon the docket then.

Frith.—I go upon the statute, and cannot be supposed to know the practice in the country if it differs from the law.

The Court, per DES BARRES, J., pronounced judgment, making absolute the rule to set aside the plaintiff's judgment, without costs.

FORSYTH *v.* SYMONDS.

A cause being tried before the Judge without jury, a finding for defendant was filed December 5th, and a rule being refused was taken out under the statute December 11th, which rule was, on January 4th, discharged, the bail-bond being considered defective. Plaintiff gave notice of appeal January 12th, and on the same day obtained a rule *nisi* for a double appeal from the decision refusing to grant a rule *nisi*, and the decision pronouncing the bail insufficient, (January 4th). The Court discharged the rule on the ground,—as to the first appeal, that the notice was too late under the Dom. Act of 1875, c. 11, s. 21,—and as to the second, that it was an appeal from a point of practice, involving, it was true a final judgment, but a judgment given December 5th, and left to its operation by plaintiff's default.

IN this cause a verdict was found for the defendant, and a rule to set it aside, being refused by the Judge who tried the cause, was taken out under the statute. The bail was, upon motion, pronounced insufficient for reasons set out in the argument and the judgment of the Court reported *ante*, p. 54.

Graham, now, (January 12th, 1879,) moved for leave to appeal from the judgment of the Court refusing to grant the rule *nisi* for a new trial.

Rigby, Q. C., contra, objected to the rule being granted, on the ground that notice of appeal was required by the rules of the Supreme Court of Canada to be given within twenty days after the judgment appealed from.

Graham, in reply, said he had given notice this morning, and intended to ask for further time, under the peculiar circumstances of the case.

The motion was renewed after recess, *Graham* contending that the objection taken by defendant's counsel could only be taken before the Appeal Court, as in *Boak* v. *Merchants' Marine Ass'n.*

A rule *nisi* was granted for an appeal from the judgment refusing the rule *nisi* for a new trial, and also for an appeal from the judgment pronouncing the bail insufficient, both appeals being provided for in the same rule.

Graham, for plaintiff, now, (January 19th, 1876,) moved to make absolute the rule.

See sec. 20 of Supreme Court Act, 1875, cap. 11, providing for an appeal from the judgment upon any motion for a new trial upon the ground that the Judge has not ruled according to law.

I admit we are late in moving for appeal on the refusal to grant the rule, but section 26 of the Supreme Court Act provides for extension of time Here there are special circumstances, as we have lost the benefit of a rule under the statute. If the time is urged against me, I will have to ask for extension, under section 26.

As to the appeal from the order setting aside the bail-piece, that is no doubt a final judgment.

YOUNG, C. J.—The rule for new trial was refused by a single Judge.

Graham.—It is signed by the Court. In the old practice the rules were taken from the Court. The whole Court was moved. *James*, 339. The first and last day of the sittings we have a full Court, and in the intermediate time a single Judge is armed with all the powers of a Court. But the Court never interferes.

DESBARRES. J.—The Judge who tries the cause is really the person who decides the question as to refusal of a rule *nisi*, although he may consult with his brothers.

Graham.—It is not necessary for me to say whether it was the Judge or the full Court that refused the rule. In the English practice the whole Court hears the argument on the granting of the rule *nisi*.

Rigby, Q. C., contra.—The rule here is double-barrelled. If he wishes to appeal from both judgments, he should make a separate application in each. He cannot appeal on the refusal to grant the rule *nisi*, for, first, he has waived that right by proceeding under our statute, acknowledging the practice to be to move a single Judge, and failing that he has taken a rule under the statute. Secondly, by sec. 21 of the Supreme Court Act, he should have given notice within twenty days after the judgment appealed from. If the application is to the Court for further time, it should have been applied for before the expiration of the statutory time.

There is nothing in the statute to allow an appeal from the decision of a single Judge. He might just as well ask for an appeal from a Judge at Chambers. The remedy in the present case is provided by the statute which gives a rule with security, and he can't, after adopting that, go back to the refusal

in the first instance. He has in fact had his rule *nisi*, and it has been set aside. If he can move for an appeal from the refusal now, he might as well have gone on under his rule under the statute, and after that had been discharged, taken out this double-barrelled appeal.

The setting aside of the rule for irregularity in the bail-piece is not appealable. It is a matter of detail over which the Court has entire control. Could an appeal be had from a decision striking a cause off the docket, because the papers were not on file as required by statute?

There is no appeal on matters on which the Court exercises a discretion.

Graham.—It is useless to argue the question whether we have an appeal. If there is no appeal, that point will be taken at Ottawa, and it will be dismissed. In the Prince Edward Island land case, the whole question as to the right of appeal was argued below, and had to be gone over again afterwards.

I contend as to the second appeal that the bail-piece was sufficient. That was a final judgment discharging a rule *nisi*. A rule discharging a rule *nisi* for a verdict is final, and nothing further can be done in the cause.

Cites R. S., cap. 94, sec. 220, raising an implication that it is the *Court* that refuses the rule *nisi*.

Sir William Young, C. J., now, (January 26th, 1878,) delivered the judgment of the Court:—

This cause was tried before me under cap. 94, R. S., sec. 213, without a jury, and a written opinion and finding filed December 5th. Plaintiff's counsel moved me in open Court for a rule *nisi* for a new trial, which I refused, and an appeal from which refusal could only lie under the Supreme Court Act of 1875, sec. 20, on the ground that I had not ruled according to law. Supposing it would lie, the plaintiff should have given notice in writing, under section 21, within twenty days, or such further time as a Judge should allow. No further time was asked for or granted, and notice of appeal was not given until the 12th of January. But under chapter 94, R. S., section 212, the plaintiff took out a rule on the 11th of December, under the statute, having filed a bail bond in $160,

but not to respond the judgment, and upon that ground the rule of 11th December was set aside on affidavit and motion, on the 4th January, 1878.

Now, the rule of 11th December was not a rule for a new trial in the ordinary course, but a special rule peculiar to the practice of this Court, and granted upon the special condition that the bail should undertake, not to render the body in their discharge as in other cases, but to respond the judgment. This the plaintiff failed to do, whether by omission or design we know not, and he now asks an appeal on this point of practice, involving a final judgment, it is true, but a judgment given December 5th, and left to its operation by his own default.

The rule *nisi* therefore of the 12th January for a double appeal, which of itself is an anomaly, is discharged, but without costs.

ACADIA CO-OPERATION SOCIETY *v.* FRASER.

Rule *nisi* for new trial discharged, no notice of bail having been served during the Term or Sittings, as required by Rules of Court, p. 13.

Quære, whether the addition of a deponent is indispensable in an affidavit of justification.

This cause was tried before DesBarres, J., at Pictou, and a verdict found for the plaintiff for one dollar. A rule was taken under the statute to set the verdict aside.

Meagher moved during the present term to discharge the rule, on the ground that one of the parties justifying was not described, *i. e.*, that there was no addition, and further that notice was not served until November 12th, although the cause was tried in June previous. *Rules of Court*, p. 13.

Rigby, Q. C., contra.—The deponent says in his affidavit that he is a freeholder. The Court has a right to allow me to file this notice yet.

The Court, *per* Sir William Young, C. J., now, (January 26th, 1878,) discharged the rule, but, after referring to *Tidd*, 179; *1 East.*, 330; *2 B. & C.*, 563; *Ch. Arch.*, 1619, citing rule of *H. T.*, 1853, declined to say that the addition of a deponent was indispensable.

HANNON *v.* McLEAN.

To an action for converting goods of the plaintiff, taken by the defendant, a Sheriff, out of the possession of plaintiff's father, who had formerly owned the goods, defendant, attacking the transfer on the ground of fraud, pleaded a justification under an execution, and on the trial put in evidence the execution but not the judgment. The Judge instructed the jury that if a transfer had taken place to the plaintiff, the defendant should have shown the judgment as well as the execution.

Held, that this was no misdirection.

THIS was an action of trover, brought against the Sheriff of Cumberland for goods taken under execution. Defence that the goods were the goods of plaintiff's father, against whom the execution issued. The cause was tried before Mr. Justice SMITH, at Amherst, in June, 1877. A verdict was found for plaintiff under the Judge's charge, and a rule *nisi* to set it aside, and for a new trial, on the ground of misdirection, was granted, which was argued January 11th, 1878, before YOUNG, C. J., and DESBARRES, McDONALD, and SMITH, J J.

Rigby, Q. C., in support of rule.—This was a case where the question of fraud should have been put to the Jury. The only question is whether it could be put under the pleas. In *Bullen & Leake*, 770, n. *a.*, it is laid down that where the Sheriff is sued with the party who sued out the execution, judgment as well as execution must be pleaded, but when the Sheriff is sued alone, only the execution. *Andrews* v. *Morris*, 1 Q. B., 3, 17; *White* v. *Morris*, 11 C. B., 1075, overruling a case in *6 Q. B.*, 166; *1 Waterman on Trespass*, 625. I think this is the distinction, that where the property is in the possession of the party against whom the execution issues, the plea of property alone is sufficient. *4 M. & G.*, 972.

W. A. Johnstone, Q. C., contra.—It must not be assumed that the property was taken from the possession of the father alone; his son, the plaintiff, was living with him at the time. To put the question of fraud to the jury, fraud must be pleaded; that was settled in this Court in *Hill* v. *Archbold*, 1 Oldright, 452. The principle that the Sheriff when sued by a third party, not the party against whom the execution issued, must shew a judgment as well as an execution, was settled in *White* v. *Morris*, 11 C. B., 1015; see also *Roscoe*,

N. P. Ev., 804; *Addison on Torts*, 658; *Taylor on Evidence*, sec. 659; *6 Q. B.*, 173; *Haigh* v. *Wilson*, 2 Johnson, 46.

Rigby, Q. C., in reply.—In *White* v. *Morris*, cited, there was a written assignment of the property. *Harrison* v. *Dickson*, 12 M. & W., 142; 8 A. and E., 121. In these cases, trespass for taking goods, it was held that the question of the plaintiff's property in the goods could only be put in issue by a plea denying plaintiff's property. See also *7 Car. & Payne*, 581; *Selwyn's N. P. Ev.*, 2017.

McDONALD, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

The plaintiff, Michael Hannon, brought this action against the defendant, the Sheriff of the County of Cumberland, for the conversion of a mare, a colt and a waggon. It appears, by the evidence, that the mare and colt were, at one time, the property of the plaintiff's father, James Hannon, who at the time of the transaction in question resided at Roselyn, and that they were subsequently claimed by a brother of the plaintiff, John Hannon, who had the possession of them and from whom the plaintiff bought them, at River Philip, on the 20th day of January, 1873.

The evidence does not show very clearly how John Hannon acquired the right, but the father swears that the plaintiff owned the mare, colt and waggon when they were taken, and the plaintiff himself gives similar evidence. The father says that the plaintiff had the mare and colt from the 20th of October, 1873. After having bought them from John, at River Philip, the plaintiff arranged to send them to the father for the purpose of wintering them, and in that way they were levied upon by the defendant, as Sheriff, under an execution against the plaintiff's father, at the suit of one Silas H. Morse.

The pleas are a denial of the conversion, no property in the plaintiff, no possession or right of possession in the plaintiff and a justification under the writ of execution.

There was no evidence tendered on behalf of the defendant, and the evidence of the plaintiff's witnesses was entirely uncontradicted. The writ of execution was put in evidence. but the judgment was not. The learned Judge who tried the

cause instructed the Jury that if a transfer had taken place to the plaintiff the defendant should have shown the judgment on which the execution issued, as well as the execution itself to enable him to sustain his defence of justification; and the Jury found in favor of the plaintiff. It appears that, at the trial, as well as at the argument, the main contention for the defence was that the transfer was void as being in fraud of the creditors, and that it was not necessary for the Sheriff, in such cases, to show a judgment, but that the writ of execution alone was sufficient. *Leake* v. *Loveday et al.*, (decided in 1842,) 4 M. & G., 972, and *Bessy et al.* v. *Windham*, (decided in 1844,) 6 Q. B., 166, are authorities in favor of that position; but *White* v. *Morris et al.*, (decided in 1852,) 11 C. B., 1015, is very decisive to show that the learned Judge who tried this cause correctly charged the jury; and all the English authorities that I have been able to read have for the last quarter of a century and upwards adopted the same view. *White* v. *Morris* decided that where goods were assigned as security for an advance of money, upon trust to permit the assignee to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made, the assignee has sufficient possession to entitle him to maintain trespass against a wrong doer. Such an assignment, though void as against creditors, is good as between the parties and as between either party and a stranger; and a bailiff of a County Court, claiming to seize goods on behalf of a judgment creditor, is a stranger, within that meaning, unless he proves the legal authority under which he seized, viz., "the judgment." CRESSWELL, J., said; "This, therefore, is a case in which the issue on 'not possessed' should have been found against the defendants, the plaintiffs having proved the assignment, and that which was attempted to be proved in the other issue being no answer at all." WILLIAMS, J., said; "I am of the same opinion. In deciding as we do, I think the Courts are only reverting to the doctrine which has long been established, that, where the plaintiff is any other than the execution debtor, the Sheriff can only justify the seizure by showing the judgment as well as the writ." He said; "It cannot be denied that this decision is directly opposed to that of the Q. B. in *Bessy* v. *Windham*.

I think that was a mistaken decision. It proceeds upon an erroneous assumption that the production of the writ is evidence of the judgment." One Judge said that instead of the execution being evidence of a judgment, it was only evidence that somebody said there was a judgment.

Addison on Wrongs, at page 659 says that "if the *plaintiff* in the action is not an execution debtor, but some third party, the Sheriff must show a judgment, and the production of the writ alone is not sufficient." And *Waterman*, in his work on *Trespass*, vol. 1, p. 625, says that "when goods taken by an officer are claimed by a person who was not a party to the suit, and the latter brings trespass, and his title is contested on the ground of fraud, a judgment must be shown if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that the officer acted for a creditor that he can question the title of the vendee." In addition to these authorities, we have the decision of the Court in *Mills* v. *McLean*, 1 R. & C., 379, holding that in an action by a third party against the Sheriff for taking property under a writ of attachment authorized by the act relating to absconding debtors, the Sheriff must prove the debt as well as the writ of attachment, because the validity of the transfer cannot be questioned but by a creditor, proved to be such, or by some one acting on his behalf, and the writ of attachment is no proof of indebtedness in any Court authorized to try that question.

The rule *nisi* to set aside the verdict must, therefore, be discharged.

CITY OF HALIFAX *v.* EDWARDS.

THE Sewerage Act of 1873, cap. 14, provided that wherever two-thirds of the rate-payers in any street, &c., should petition for a sewer, the same should be constructed, and that one-fourth of the cost should be paid by a special assessment on the owners of real estate, such assessment to be payable immediately on the completion of the sewer. The Act of 1874, passed May 7th, repealed these provisions, and provided that where one-half the owners of property on any street, &c., petitioned and deposited the amounts chargeable according to the act, the Council should order a drain to be constructed. Preliminary steps having been taken for the construction of a sewer past defendant's property, on April 22nd, 1874, the report of the engineer was accepted, and the Board of Works authorized to carry it into effect, but the tender and contract bore date respectively June 15th and July 2nd, 1874. The suit was instituted under the Act of 1873.

Held, affirming the decision of the County Court, that there were no acquired rights on the part of the city against the defendant under the Act of 1873, and that the Act of 1873 having been repealed, the plaintiff must be nonsuited.

THIS was an appeal from a decision of Judge JOHNSTONE of the County Court. The subject matter was an assessment on defendant for sewer rates. The point on which the decision and the argument turned was whether the assessment was legal, being made under the Sewerage Act of 1873, while the sewer was constructed under a contract made after the passage of the Amending Act of 1874. The City was nonsuited by the Judge on this ground, and an appeal taken out by the City, which was argued January 16th, 1878, before DES-BARRES, MCDONALD, SMITH, and JAMES, J J.

Shannon, Q. C., opens in support of appellant, and reads papers sent up, certified by Judge of the Court below.

Sedgewick, contra, objects that the minutes of evidence are not sent up, they containing several points raised on behalf of defendant, and overruled by the Judge, which he should have the opportunity of arguing under this appeal.

JAMES, J.—If Mr. Shannon succeeds here on this point, the case goes back to trial, and you can take your other points over again.

Shannon, Q. C., in support of appeal.—The Acts referring to this matter are chap. 14 of the Provincial Acts of 1873, sections 1 and 2, and chap. 32 of the Acts of 1874, sections 3 and 4. By the Act of 1873, parties were assessed in proportion to the assessable value of their property; by the Act of 1874 parties were compelled to pay so much a foot for the length of sewer in front of their premises.

The report recommending the sewer here is dated 10th April, 1874; the minutes of City Council adopting it are dated 22nd April, 1874; on that day the City Council directed the construction of the sewer; the Act of 1874 passed on the 7th of May following.

The COURT.—The resolution says that the sewer is to be constructed under the new Sewerage Act; what did that mean?

Shannon, Q. C.—We do not know; we must assume that it referred to the Act of 1873, which amended a prior sewerage act. The date of the contract for the construction of the sewer is July 2nd, 1874.

SMITH, J.—Was not the assessment made after the Act of 1874 came into operation?

Shannon, Q. C.—Yes.

McDONALD, J.—Then should it not have been made in accordance with the statute in existence at the time?

Shannon, Q. C.—We contend that everything was settled by the resolution directing the construction of the sewer. *Surtees* v. *Ellison*, 9 B. & C., 750, is a strong case in support of the decision of the Judge. See also *Kaye* v. *Goodeave*, 6 Bingh., 582; also *Morgan* v. *Thorne*, 7 M. & W., 400; also *Simson Ready*, 11 M. & W., 344. In our favor we have a decision of the highest authority in the United States, *Pacific Mail St. Co'y.* v. *Joliffe*, 2 Wallace, 450.

The question is, did the Act of 1874 stop all proceedings taken under the Act of 1873 and not finally completed. *Potter's Dwarris on Statutes*, 158, n., 159; *Sedgewick on Statutes*, 109, 113, and 164. Sedgewick states on the latter page that Courts are cautious about giving statutes a retroactive effect.

McDONALD, J., refers to the chapter in our Revised Statutes on the construction of statutes.

Sedgewick, contra.—All that was done prior to the passing of the Act of 1874 was the resolution to construct the sewer, a mere expression of intention, by which the defendant incurred no liability. There was no petition for a sewer here, as required by the Act of 1873, but a mere petition for water in Maynard Street. This much appears from the engineer's report sent up here.

The City Council experienced difficulty under the Act of 1873, and accordingly they prepared an act which they requested the Legislature to pass. The act was before the Legislature, but not assented to by the Governor, when the resolution of the City Council was passed.

DESBARRES, J.—That explains the expression in the resolution, "the new sewerage act."

Sedgewick.—While we have here a mere expression of intention on the part of the Council, before anything is done creating a liability, the act is passed declaring what the lia-

bility shall be. The City Council itself was not bound by the resolution until the contract was made.

The assessment here is made up, according to the surveyor's report before us, on the cost of constructing water pipes as well as the sewer, while the defendant is not liable to contribute towards the water pipes.

The COURT.—That point cannot be raised here; there is no evidence of it.

Sedgewick, refers to the cases and other authorities cited by Mr. Shannon.

Shannon, Q. C., in reply.—The language of the chapter in the Revised Statutes on the construction of the statutes is conclusive in our favor.

SMITH, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This is an appeal from the decision of the Judge of the County Court for the County of Halifax. This action was brought, as we gather from the judgment below, to recover from the defendant the sum of $53.40, or 89 cents per foot for 60 feet of sewerage constructed past defendant's property in this city. The suit was instituted under sec. 4, cap. 14, of the Provincial Acts of 1873. It was contended by defendant's counsel, that by an act passed 7th May, 1874, the said section was repealed, and that consequently the action could not be sustained. On the other hand it was urged that the city had acquired rights under the proceedings they had taken in reference to the construction of the sewer in question, which could not be affected by the the repealing of the statute.

That the sections of the Acts of 1873 and 1874 are entirely different, and essentially vary the mode of obtaining the means for the construction of such a sewer, is unquestioned. Sec. 3 of cap. 14 of the Acts of 1873 provides that, "wherever *two-thirds* the ratepayers residing or owning any property on any street, highway, or thoroughfare, shall petition the City Council respecting the construction of a common sewer, or drain, the City Council, except for sufficient reasons to the contrary, shall order the same to be constructed at within a reasonable time." The 4th section of the same act provides

"that the cost of making and constructing any common sewer, or drain, or section thereof, shall be borne and paid as follows, that is to say, one fourth of such cost shall be paid by the owners of real estate, &c., by means of a special assessment to be made and *levied upon* such owners of real estate * * * such assessment to be due and payable *immediately after the completion* of such common sewer or drain." Sec. 3 of the Act of 1874 provides that wherever one half of the owners of property on any street or thoroughfare shall petition * * * * and *shall have deposited* with the City Treasurer the amounts chargeable according to the provisions of the Act, then the Council shall order the sewer, or drain, to be constructed. Under the 4th section of this Act a different mode of estimating the proportion of expense payable by the owners of property is provided. Instead of an *assessment* to be *levied* as under the Act of 1873, each owner of real estate on either side of said street shall pay the city $1.25 for every lineal foot of his property fronting thereon; which, as already noticed, must be deposited in the nature of a condition precedent to the order for the construction of the sewer. In view, then, of the statute of 1874, repealing sections 3 and 4 of the Acts of 1873 and substituting new and different provisions, we have to enquire into the soundness of the position taken by the plaintiff's counsel, that the proceedings taken by the city, previous to the passing of the Act of 1874, are entitled to be continued, and closed, as if no such repealing statute had been enacted. It is abundantly evident from the exhibits of the proceedings before the City Council that the last step taken by them previous to the passing of the Act of 1874 in reference to this sewer was in April 22nd, 1874, when the report of their engineer was accepted, and the Board of Works were authorized to carry the same into effect. The form of tender, and the contract for the construction of the work, bear date respectively June 15th, 1874 and July 2nd, 1874. Up to those dates the Council had done nothing more than direct the Board of Works to proceed; nor had they entered into any engagement or contract for the work by which they could be bound. At this time there were no acquired rights, as I apprehend the term, on the part of the city, as against defendant, with which the act of 1874 could

conflict. The cost of construction had not been then ascertained, or assessment made, which obviously could not be done in the absence of a definite contract.

There can be little doubt I conceive, as to the effect of the statute of 1874 upon that of 1873. In *Surtees et al.* v. *Ellison*, 9 B. & C., 750, Lord TENTERDEN says; "It has been long established that when an act of Parliament is repealed it must be considered, (except as to transactions passed and closed,) as if it had never existed. This is the general rule, and we must not destroy that by indulging in conjectures as to the intention of the Legislature." TINDAL, C. J., in *Kay* v. *Goodwin*, 6 Bingham, 582, says, "It is perfectly clear that the 5 Geo. 2 was repealed by 6 Geo. 4, chap. 16. I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded, whilst it was an existing law." In *Simpson* v. *Ready*, 11 M. & W., 344, PARKE, B., said, "When an act of Parliament is repealed the law is as if it had never passed." In *S. S. Company* v. *Joliffe*, 2 Wallace, 450, the Court cites these English authorities in giving judgment. *Miller's Case*, 1 Wm. Blackstone, is also a very strong case in point. There one Muller was made, under a compulsory clause in a statute of insolvency, to give in a schedule of his property, and deliver it up to his creditors. The statute, on this being done, authorized a discharge from all his debts, and he accordingly moved for such discharge. But the Justices of the County Court, for some reason, delayed this from time to time, until the compulsory clause of the act was repealed, and then refused it altogether. On an application for a mandamus in the King's Bench, Lord MANSFIELD held that the repeal of the law carried with it the right to a discharge, and overruled the application.

In short, this doctrine is laid down by all the text writers on the construction of statutes.

It was also contended by the defendant's Counsel that no petition was presented to the City Council as required by the Act of 1873, praying for the sewer to be constructed. The

only petition which the papers before us establish is a petition from "the residents of Maynard Street praying for water supply to be extended to North Street." How this could authorize the City Council to construct a *sewer* under the act of 1873 to bind the defendant, I am at a loss to understand.

I think the judgment of the Court below must be sustained.

FORREST, ASSIGNEE, *v.* ALMON ET AL.

PLAINTIFF as assignee under the Insolvent Act of 1869, brought an action of trover against defendant for certain goods transferred by the insolvent thirty-nine days before the assignment, the transfer being attacked in this suit as void under section 89 of the Act. Plaintiff, on the trial, put in evidence a bill of sale made by the insolvent about two months previously to the assignment, for the purpose of proving contemplation of insolvency on the part of the insolvent at the time of making the transfer in question. The circumstances connected with the said bill of sale were explained so satisfactorily to the mind of the Judge, that he withdrew the consideration of it from the jury.

Held, on a rule *nisi* for a new trial, that it should have been left to the jury to say what effect should be given to it.

THIS was an action of trover to recover certain goods transferred by A. F. Muir, of whom plaintiff was assignee, to defendants, some thirty-nine days previous to the insolvency. It was tried before Mr. Justice WILKINS at Halifax in 1877. A verdict was found for defendant, and a rule *nisi* to set it aside, and for a new trial, was taken out under the statute, and argued January 14th, 1878, before DESBARRES, MCDONALD, SMITH and JAMES, J J.

Rigby, Q. C., in support of rule.—The date of the transfer of the goods by the insolvent to defendants was 13th May, 1875, the date of the assignment under the Insolvent Act was 21st June, 1875. The date of the bill of sale of A. F. Muir to J. T. and W. Muir was 5th April, 1875.

The plaintiffs sought to avoid this transfer under section 89 of the Insolvent Act of 1869, which says that a transfer made in contemplation of insolvency shall be void. The knowledge of the persons taking the goods under the transfer is immaterial. In *Harvey*, Assignee, v. *Wylde*, tried before Mr. Justice RITCHIE in Halifax, and argued afterwards before the full Court, the terms, "in contemplation of insolvency," were

defined. There the Judge told the Jury that if when they transferred the notes, Dodge & Co., had reason to believe, and did believe, that their affairs were in such a situation that insolvency would in all probability ensue, though there was a possibility of their tiding over their difficulties, the transfer would be in contravention of the statute, and be deemed to be made in contemplation of insolvency, that it would invalidate the Act if done to secure and give a preference to the defendants. That charge was sustained by the full bench after argument. Here only a small part of the consideration for the transfer was future advances. In *Harvey*, (Assignee,) v. *Hart*, the Equity Judge held a transfer void because only a very small portion of the consideration was a previous debt. The Judge here told the jury that it made no difference what the actual state of Muir's affairs was when he made the transfer. If the state of his affairs was such that he ought to have known he was insolvent, he should be held to have made the transfer in contemplation of insolvency.

The Judge withdrew from the consideration of the jury the bill of sale from A. F. Muir to J. T., and W. Muir, which was given in pursuance of a will of six years previous, and within two months of A. F. Muir's assignment under the Act.

That the transfer was made chiefly to secure pre-existing debts is evident from defendant McIntosh's own testimony. McIntosh only testifies to $350, $250, and $75 advances after the transfer, (with the exception of $240, charges on goods,) while the indebtedness of Muir to defendants, secured by this transfer, was some $2,000.

The Judge refused to allow us to contradict Allan F. Muir, on the ground that what we sought to prove was an admission made by him after the transfer.

Sedgewick, contra.—The law presumes this transaction, (the transfer to Almon & McIntosh) to be *bona fide*. It is outside of the thirty days within which the Act raises a presumption of fraud. The bill of sale to the executors was made in pursuance of a previous obligation, and had relation back to the date when the previous obligation was entered into. The will of R. T. Muir gives to the executors all his personal property in trust, among other things, that Allan F. Muir should carry on the business, giving a security to other of testator's legatees.

That will is on record, and every person dealing with Muir is supposed to know the provisions of that will. The bill of sale was simply in pursuance of the will and of the obligation it created. *Mercer* v. *Peterson*, L. R., 3 Exch. 105 & L. R., 2 Exch., 304; *L. R., 9 Ch. Ap.*, 271; *27 U. C., Q. B.*, 244; *17 Grant*, 47; *Ib.*, 570; *24 Grant*, 365.

Under those cases this bill of sale has reference to the date of the death of R. T. Muir, and has the same effect as if it had been given then. The will itself was the bill of sale, so to speak. Those interested in the bequest could have compelled A. F. Muir to give the bill of sale. He took the business with its burdens.

As to the construction of the words, "contemplation of insolvency," where the words of an Act have received a construction, either from long practice or judicial interpretation, and are subsequently re-enacted in the same terms, the Legislature must have had in view the judicial interpretation given to those words by the Court. *9 El. & Bl.*, 54; *4 H. & N.*, 62; *9 C. B., N. S.*, 370; *L. R., 5 Ch.*, 703.

It has been held in the Canadian Courts that the words, "contemplation of insolvency," in this country mean the same as those words in the English Act. *19 U. C., C. P.*, 302. The "contemplation" must be in the debtor's mind. The Act must not only defeat and delay creditors, but must be done by reason of the actual *contemplation* by the debtor of insolvency. The debtor must have in contemplation that the act in question will give a preference. There must be the mental process in the mind of the debtor to constitute the act an act in contemplation of insolvency. *L. R., 1 P. C. C.*, 342.

The definition of Lord WESTBURY, thus given, shows that there must be *knowledge* on the part of the debtor that his circumstances are such that bankruptcy will be the probable result. If there is no knowledge there is no intent to make an undue preference. *5 B. & Ad.*, 289; *2 Bing., N. C.*, 225; *2 Scott*, 656. The bill of sale was given to cover future advances to enable Muir to carry on the business. *6 El. & Bl.*, 296; *6 M. & G.*, 895; *1 C. M. & R.*, 443.

On the evidence of plaintiffs, defendants were entitled to a non-suit, because there was no contemplation of insolvency.

The evidence of contemplation was rebutted by evidence that advances were made after the transfer.

Thompson, (follows.)—I feel that the principal point in the case is the withdrawal from the jury of the bill of sale to the trustees. That was properly withdrawn, as that transfer was made in pursuance of an obligation under the will of Muir. *6 B. & S.*, 314. That was the view the Judge took when he told the jury that that had been satisfactorily accounted for. There was a duty resting upon the trustees to take that security, and it was taken by the trustees when the time came to settle up the estate.

If the validity of that bill of sale to the two brothers were the question under trial, it should have been given to the jury, but with a charge similar to that in *6 B. & S.*, 314. But it was simply given as a collateral circumstance, and it was for the judge to say if, under the circumstances, that was evidence of contemplation of insolvency. The circumstances under which it was given were not in dispute, and it was solely for the Judge to say that under the circumstances no such presumption of law as was contended for arose from that transfer. The Judge simply told the jury that under the circumstances they might dismiss that from their mind. *Bump on Fraudulent Conveyances*, 543, 568. *Robson on Bankruptcy*, 129; *Ex parte Imburt.*, 1 DeG. & J., 159; L. R., 10 *Eq.*, 648; *Perry on Trusts*, sec. 231, 430. 431, 838.

As to the rejection of Forrest's evidence in rebuttal. The only ground laid for the attempt to introduce that rebutting testimony, was the evidence that A. F. Muir did not tell Forrest that the goods were transferred for advances that were never made. No time or place is given. In the second place it was irrelevant. Admissions made previously to the transfer would be important, but, once it is complete, he is a stranger to it, and his declarations are not binding on the grantee. They can only contradict him on matters material to the issue. *Bump on Fraudulent Conveyances*, 668.

The check was given against proceeds of furniture sold or arranged to be sold, and the proceeds to be deposited in the Halifax Bank. The sale of the furniture was not made to cover the check, but the check drawn against the proceeds of the sale.

Plaintiff should have been non-suited, on the ground that there was a lien for freight, duty and taxes. Before he could bring action he should have tendered the amount for which the lien existed. Mr. Rigby has, on this point, confounded the action of trover with replevin in which the lien must be set up. It was not necessary for us to set out in trover the title by which we held the goods. *12 Ad. & El.*, 116. In the main case there reported, it is true it was held that the lien could not be set up on the plea of not guilty, but in a case cited on page 116, the pleadings were different, and the lien was allowed under the plea that "they were not the goods of the plaintiff." Here we have a better plea, that the goods were ours. *Roscoe, N. P.*, 955.

There was not sufficient proof of demand. The demand was, "we are instructed by the assignees of the insolvent estate of Allan F. Muir to call upon you to deliver the goods and property received by you from the insolvent just previous to the insolvency." That is not sufficient to designate it. *Roscoe, N. P.*, 950.

The declaration was not sufficient to let in the evidence on which they seek to avail themselves of the Insolvent Act. There should be an allegation that the goods had been wrongfully converted, and that they had been assigned in contemplation of insolvency. In other words, the charge of fraud should appear in the declaration. The evidence was objected to on this ground. There is no form in *B. & L.*, because these matters appear in England to be decided in equity. I cited the form used in Canada on motion for nonsuit, and can find no case of trover in the Canadian reports, where a claim like this was let in without the element of fraud being in the declaration. *27 U. C., Q. B.*, 244; *White & Tudor's Leading Cases*, 476; *9 C. B.*, 541; *2 F. & F.*, 753.

McDonald, Q. C., in reply.—On the point that trover will lie in the form brought, cites Insolvent Act of 1869, sec. 16, giving the Assignee all the property of the insolvent. *4 M. & Gr.*, 972; *2 F. & F.*, the case already cited on the other side. To require a different form of declaration would make it a special action. The only count in trover is that we have in our declaration. The statute requiring fraud to be set out refers only to the plea or replication, not to the declaration.

There can be no action of trover without fraud, and if fraud required in all cases to be specially set out, there could be no declaration in trover in the usual form. There is no fraud between Forrest and Almon.

The lien, if relied on, must be pleaded. *R. S.*, Cap. 94, sec. 140. There is no pretence of a lien. The $240 was advanced, and was included in the notes. It was paid out of the money given to Muir as proceeds of the notes discounted. It was a part of the money debited to Muir, included in the discounts to Muir.

The Court has already construed the words, "in contemplation of insolvency," in *Harvey* v. *Wylde*. If the party knew or had reasonable cause to believe that insolvency would ensue, the transfer is within the terms of the Act. *Robson*, 139; *4 M. & S.*, 169; *2 Scott*, 229.

The bill of sale to the brothers should have been left to the jury, *i. e.*, the question whether that did not render the estate insolvent; together with the other facts in proof. The whole should have been left to the jury as evidence from which to infer the contemplation on his part of insolvency when the transfer to Almon and Mackintosh was made. The definition of Lord WESTBURY is in entire accordance with our contention, but contrary to that of the Judge here.

Refers to evidence to show that Muir must have known the circumstances of his business, and that insolvency would ensue.

The transfer here was solely on account of the antecedent debt, because the advances on which the defendants rely were covered by the McGowan draft.

There was no lien under the will. On the contrary, the lien was actually discharged, because the mode in which the rights of the sisters are to be enforced is pointed out in the will. If it was convenient the money was to be secured by lien on the stock. If not convenient, they were to take $400 a year. There was an alternative, and the alternative adopted was to dispense with the security on the stock. They allowed three or four years to move on without taking the security. Their liabilities were contracted on the faith of the stock unencumbered by any such lien. The transfer for the sisters was a perfectly voluntary conveyance.

At all events it should have been left to the jury to say whether the sisters had not elected to do without the security provided by the will. *4 Bing.*, 22. *7 B. & C.*, 534.

DESBARRES, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This was an action of trover brought by the plaintiff as assignee, under the Insolvent Act of 1869, of Allan F. Muir, an insolvent, against the defendants, for wrongfully converting to their own use, and depriving the plaintiff, as such assignee, of the use and possession of certain goods described in the writ; also, for the price and value of two shares in the Provincial Building Society of Halifax, sold and delivered by Allan F. Muir before his insolvency to the defendants, and for money had and received by the defendants for the use of the said Allan F. Muir, and payable to plaintiff as such assignee. The defendants by their first plea, deny the conversion of the goods. Secondly, they deny the plaintiff's right of property in the goods; and, thirdly, they deny their indebtedness for the goods as alleged. A verdict having been found for defendants at the trial, a rule *nisi* was taken under the statute to set it aside on various grounds, the most important of which are the following: (5.) For misdirection of the Jury by the learned Judge who tried the cause, by withdrawing from their consideration the bill of sale produced in evidence from Allan F. Muir to William Muir and John Muir. (6.) For misdirection of the Jury by the learned Judge when explaining the meaning of the words, "contemplation of insolvency," in the Insolvent Act of 1869."

The facts of the case, as gathered from the Judge's reports and the documents, &c., produced in evidence at the trial, may be stated as follows: Robert Thomas Muir, by his will dated 23rd August, 1871, bequeathed to his brother, Allan F. Muir, now insolvent, his book-selling business, subject to the payment of $4000, to his executors and trustees, for each of his two sisters, Agnes and Euphema Muir, to be secured at a convenient time after his death, if the trustees should see necessary, by a first lien upon the stock, or, if found inconvenient to pay said sums, the said trustees were authorized to allow the said money to remain in the business, he, Allan F. Muir, paying to each of his said sisters the sum of $400 each during

their respective lives, having the option of paying off the said sums so bequeathed to his sisters, at any time he might see it convenient to do so; the testator, by his will, imposing upon the trustees the duty of examining at any and at all times the books of Allan F. Muir, and taking steps, if necessary, to effectually secure the interest of his said sisters in the said business. Robert T. Muir died in November, 1871, and his brother Allan F. Muir, then took charge of the business, and conducted it up to the time of his assignment for the benefit of his creditors. At the death of Robert T. Muir, the business, according to the evidence of his successor, Allan F. Muir, was in a flourishing condition, having left $18,000, and a surplus above debts and legacies. The first account of stock was taken in 1872, when the business was found to be in a very good state, there being then between $20,000 and $22,000 surplus. There was also a large surplus in 1873, about the same as in the preceding year. In 1874 it was not so prosperous. In May or June, 1875, a balance sheet was taken for 1874, and it was found that the business had not been so prosperous as before, but there was still a balance or surplus of $8,000 or $10,000. On the 5th May, 1875, a bill of sale was executed by Allan F. Muir, to William Muir and John Muir, in which the condition, amongst other things, was recited, on which the book-selling business carried on by Robert T. Muir in his lifetime, had been bequeathed to him. By that bill of sale, Allan F. Muir assigned and transferred to William Muir and John Muir, as trustees, "all the stock in trade, goods, chattels, debts and personal effects belonging to him, the said Allan F. Muir, and comprehended in the stock in trade or connected with the said business, conducted by him under the name and style of R. T. Muir and Company, and contained in the premises occupied by said firm of R. T. Muir and Company, on the East side of Granville Street, in the City of Halifax and elsewhere; *First.*—To have and to hold the same as a lien and security for the payment to the said Agnes Muir and Euphemia Muir, of the said sum of $4,000 each, or the said annual payment of $400 to each of them, in lieu thereof, as provided for in the said will of Robert F. Muir; *Secondly.*—To hold the same as a lien and security for the payment of $2,000, and the annual interest thereof, to the said William Muir, as pro-

vided for in said will of Robert T. Muir; *Thirdly.*—To hold the same as a lien and security for the sum of $549, and interest, due to the said William Muir from the estate of the said Robert T. Muir. It was provided in and by the said bill of sale, that if Allan F. Muir should pay to the said Agnes and Euphemia Muir the sum of $4,000 each, or continue to pay the annual payment of $400 each, for the time and in the manner provided by the will of Robert T. Muir, and pay to the said William Muir, on demand, the sum of $549, with all interest thereon, then the bill of sale was to become absolutely void.

On the 13th May, 1875, Allan F. Muir transferred to the defendants, as appears from the evidence of John Eckersley, the chief clerk of the warehousing department and from the transfers themselves produced in evidence, 43 cases of goods, of the value of $2,291, which have ever since been held in the warehouse as the property of the defendants. These goods, with the exception of three cases, were transferred by Allan F. Muir to the defendants, as soon as they were warehoused, and all of these, as well as the goods transferred under the bill of sale of 5th April, 1875, are claimed by the plaintiff as the assignee of Allan F. Muir, under sec. 89 of the Insolvent Act of 1869, as goods transferred by him to the transferees to give them an unjust preference over other creditors, thereby rendering such transfers absolutely void, and entitling the plaintiff, as assignee of Allan F. Muir, to recover the goods for the benefit of his creditors.

Such being the nature of the plaintiff's claim, it is clear that the only subject matters of contention between the parties and the real, if not the only questions to be tried were, whether the bill of sale made by Allan F. Muir to William and John Muir, and the transfer of goods made by him to the defendants, were made under circumstances that entitled the transferees to hold the goods as their own, or under circumstances that rendered the bill of sale and transfers void in law, as against the assignee of the insolvent estate. These were questions for the jury alone to decide, but the learned Judge in charging the jury did not ask them to express any opinion as to the validity or invalidity of the bill of sale. He told them, "that so satisfactorily in its connection with the will of Robert Muir, had the nature and purpose of the bill of

sale in question been explained, that they might, in his opinion, dismiss it from their consideration, and he directed them to find for the plaintiff or defendants, according as they thought the transfer was, or was not, made in contemplation of insolvency."

My learned brother, therefore, entirely withdrew from the consideration of the jury all the evidence and circumstances in relation to the bill of sale, being himself satisfied that it was made in compliance with the requirements of Robert T. Muir's will, and for that reason a valid instrument.

Now, however strong the evidence on the part of the defence may be to shew that the execution of the bill of sale by Allan F. Muir to William and John Muir, was not an act done in contemplation of insolvency, but in compliance with a duty enjoined by his brother's will as a condition upon which he bequeathed to him his business and stock in trade, yet, as the validity of this instrument was a subject of contention between the parties upon which a decision was expected, I think it ought to have been submitted to the Jury to say what effect ought to be given to it, and that in order to obtain the expression of an opinion at the hands of a jury on the point involved, there ought to be a new trial.

O'CONNOR *v.* COMMERCIAL UNION INSURANCE COMPANY.

PLAINTIFF brought his action on a policy of insurance containing a condition requiring, in the event of loss, a certificate from the two magistrates most contiguous to the place of the fire. No such certificate was produced, and plaintiff relied on a waiver of the condition, the evidence of which consisted of the fact that when plaintiff's attorney handed to defendant's agent a letter forwarding a certificate from two other magistrates and explaining why a certificate from the two nearest had not been produced, the agent said nothing. Defendants also pleaded a condition as to vacancy of the premises and change in the possession.

As to the first point, the Court held that the silence of defendant's agent, who had on other occasions expressly insisted on a compliance with all the conditions of the policy, was no evidence of waiver, and, the evidence as to change of possession and vacancy being clear, they set aside the verdict taken by consent for plaintiff.*

In this case a verdict was found for plaintiff by consent, and a rule to set the verdict aside was argued during the present term by Henry and Oxley for defendants, and C. J. McDonald for plaintiff.

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* There was a condition in the policy requiring waiver of any of the conditions to be in writing, endorsed on the policy and signed, but the judgment of the Court does not rest upon that.

SIR WILLIAM YOUNG, C. J., now, (February 5th, 1878,) delivered the judgment of the Court:—

The defendants, by their policy dated 12th November, 1874, insured for twelve months against loss or damage by fire to the extent of $2,500, the plaintiff's machinery, sugar, &c., in a paper mill situate on the Nine Mile River, near Halifax, owned by the assured, and occupied by Daniel Hughes. On the 20th August, 1875, the mill was destroyed by fire, with all the property assured, and the defendants' agent having intimated that there were suspicious circumstances connected with the fire, a correspondence ensued, to be presently examined, and payment being refused, this action was brought. The declaration is in the usual form, but does not allege, as such declarations often do, any waiver by the defendants of the numerous conditions in their policy. The material pleas, as appeared upon the trial, are the 9th, 12th and 13th,—the 9th averring that the plaintiff did not produce a certificate under the hands of two magistrates most contiguous to the place of said fire,—the 12th averring that during the assurance the building became vacant, unused and unoccupied by the owner and occupants, without the consent thereto of the defendants in writing, and the 13th averring that the property, during the assurance, was leased and rented to certain persons who went into possession, whereby a change took place in the title and possession of the mill, without the consent of the defendants in writing. The replication takes issue upon all the pleas, fifteen in number, and to the 9th plea replies that the defendants, by express renunciation and waiver thereof, exonerated and discharged the plaintiff from procuring the certificate of two magistrates most contiguous to the place of the fire. The second and fourth replications allege like renunciation and waiver as to the notices and statements of loss, upon which no objection was raised by the defendants' counsel. At the close of the evidence it was agreed that a verdict should be found and entered for the plaintiff for the amount insured, with interest from the 16th November, 1875, subject to the opinion of the Court on the law and facts of the case. The matter then stands before us in this way. Whatever circumstances may have induced the Company to

resist this demand, there was no proof impeaching the *bona fides* of the plaintiff in effecting the insurance, and claiming as for a total loss, and the defendants rest upon the non-fulfilment or the violation of certain conditions, to wit, the 5th, part of the 14th and the 19th, attached to their policy. By the 5th; "If, during this assurance, any change takes place in the title to, or the possession of the property described in the policy, or in the event of any change affecting the interest of the assured therein," (then come other contingencies which I need not notice,) "or if the premises become vacant by the removal of the owner or occupants, then, and in every such case, this insurance shall be absolutely void, unless the consent thereto of the Company in writing shall have been obtained and endorsed on the policy." By the 12th, it is stipulated that "the Assured must also procure a certificate, under the hands of two magistrates most contiguous to the place of the fire, and not concerned, or directly or indirectly interested in the loss or the assurance, as creditors and otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the Assured, and have made diligent inquiry into the facts set forth in the statement and account of the Assured, and know or verily believe that the Assured really, by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned." And by the 19th it is declared that "no one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the Company, unless the waiver is clearly expressed in writing, by endorsement upon this policy, signed by the Agent of the Company at Halifax, (N. S.)"

Upon these three points, change of possession or title and vacancy, the alleged defect of the certificates of loss and waiver, the case was elaborately and ably argued, and a multitude of authorities cited, during the present term, the leading facts appearing to be as follows:

And, first, as to the certificates procured by the plaintiff from Messrs. Ackhurst and Pitts, Magistrates residing in Halifax, and from Mr. Meagher, a Notary Public, then residing at

Bedford, close to the site of the fire, it was admitted that the latter, under the condition, was of no avail; and if not admitted it was clearly in proof that there were many magistrates more contiguous to the fire than Mr. Ackhurst or Mr. Pitts. The plaintiff said that Burgess and Hamilton were the nearest Magistrates to the mill; that Hamilton was in New Brunswick when the mill was burnt, and did not return for some weeks after. Burgess gave the plaintiff a certificate which the plaintiff handed to his counsel, but Burgess scratched his name out of the paper; in the presence, and, as it was alleged, at the instance of Mr. Daly, one of the solicitors of the Company, every obstacle, according to the plaintiff's attorney, being thrown in the way of furnishing the preliminary proof.

The plaintiff says that Ackhurst, Pitts and Meagher had known him for many years, that there are no magistrates residing between the city and the mill other than Chipman and Evans, with the exception of Burgess and Hamilton, that he applied both to Evans and Chipman for a certificate, and was refused, on the ground assigned by Evans that there were other magistrates nearer to the fire than himself. Mr. Evans was called for the defence, and, being Treasurer of the County and acquainted therefore with all the magistrates in his neighborhood, he gives the names of a great many nearer the fire than the two who signed. It is clear, therefore, that the condition of the policy has not been literally complied with, the magistrates nearest at hand being either unable or unwilling to grant the certificate, the legal effect of which we have now to consider.

Looking to the English decisions and our own, I should have thought that this did not admit of a doubt, and as my learned brother who tried the cause expressed it in his minutes, that the objection was insuperable. But a new light seems to have broken in upon some of the numerous tribunals in the United States, which have gone a great way in repudiating or neutralizing the clause.

The leading English case of *Worsley* v. *Wood*, 6 T. R., 710, is familiar to us all, where it was held that the production of a certificate of the like character was a condition precedent, and the Court of King's Bench highly approved of its being

inserted in the policy as a guard against the frauds too often practiced, as they observed, on insurance offices. They upheld, therefore, its necessity, even supposing that the refusal of it were a wrongful act, which, under the circumstances of that case, they did not admit, and we cannot assume here.

This case was followed in Lower Canada in 1829, in *Scott* v. *The Phœnix Assurance Company*, Stuart's Reports, 354, and by our own Court in 1857, in *Moody* v. *Etna Insurance Company*, 2 Thomson, 173. "The reasoning of the King's Bench," said my venerable and learned predecessor, in the year 1796, when *Worsley* v. *Wood* was decided, "is equally applicable in the present day. Underwriters," he adds, "are so liable to be imposed upon by secret fraud, that they are right to guard themselves against it, by requiring certificates from magistrates in the neighborhood that, in their opinion the loss was occasioned by accidental, and not by designed burning. and if parties do not choose to insure upon these terms, they need not pay the premiums."

In a note to *Worsley* v. *Wood*, republished in the 1st vol. of *Bennett's Fire Insurance Cases*, 66, he says, that "notwithstanding its great strictness, it has been often followed, and though sometimes criticised, has never, as far as we know, been overruled," and he cites many cases on this side of the Atlantic, including *Leadbetter* v. *Etna Insurance Company*, in the State of Maine, in the year 1836, which he republishes at fol. 539, where WESTON, C. J., says, that a condition of like character, with the present was fairly and rightfully imposed, fully accepted and made a part of the policy. It was of a character not to be misunderstood, and was interposed to protect the defendant against fraud. In another case which he cites from *7 Cowen*, 472, SAVAGE, C. J., says; "In cases of this kind great strictness is required, and the plaintiff cannot recover without a literal compliance with the condition." So in *2 Peters*, 25, the certificate was held indispensable preliminary proof.

In *May's Treatise on Insurance*, published at Boston in 1873, fol. 570, many cases are cited in which so rigid a rule is attacked and instances are given where, as may be justly said, it would work great injustice, and there is an obvious disposition

to disparage and evade it. Its object, he says, is completely secured by the proximity of the certifying magistrate, and the maxim may be applied "*de minimis non curat lex.*" Now, however, we might be disposed to yield to these ingenious speculations, shut out as we are from the reasoning of almost all the American cases referred to, but not within our reach, we must adhere to the English decisions, which bind us and are confirmed by our own. This condition, therefore, is fatal to the plaintiff, unless it has been waived, which is the second, and upon this head the main enquiry.

Let us first see how the evidence stands. Messrs. Ackhurst and Pitts' certificates are dated 11th September, 1875, and the plaintiff's affidavit was made on the 10th. Some previous papers, however, had been submitted by the plaintiff's attorneys, with a note of the 3rd September, which drew forth the following answer on the 6th from the agent of the defendants:—

"COMMERCIAL UNION INSURANCE AGENCY,

Halifax, 6th September, 1875.

MESSRS. MCDONALD & WITT,

Gentlemen,—I am in receipt of the papers accompanying your note of 3rd inst., and find that they are not in accordance with the requirements of the policy to which they refer.

They are insufficient, inasmuch as amongst other material facts that should be stated, they are not accompanied by the certificate of two magistrates, as required by condition No. 14.

I am, gentlemen,

Your obedient servant,

B. W. SALTER, *Agent.*"

The papers to which this refers were the certificates of Mr. Meagher and Mr. Ackhurst, of 3rd September, and an affidavit of the plaintiff of that date. The note of same date from the plaintiff's attorneys asked the agent to inform them what further papers were necessary that they might furnish the same. The answer was as we have seen. Then came the

papers of the 10th and 11th September in a letter of the 16th from the plaintiff's attorneys, as follows :—

"*Halifax, N. S., September 16th, 1875.*

B. W. SALTER, ESQ.,
Agent Commercial Union Ins. Co.,

Herewith we forward papers in support of O'Connor's loss, which we trust will be found satisfactory. The former claim was supported by the certificates of Mr. Meagher, a Notary Public, and Mr. Ackhurst, a Justice of the Peace. The affidavit in the present instance is certified by Mr. Ackhurst and Mr. Pitts, magistrates residing in the city of Halifax. The nearest magistrate to the insured property is Mr. Hamilton, who is at present out of the Province. The next nearest Justices are Evans and Chipman, neither of whom would certify, stating that they had no knowledge of the circumstances of O'Connor, and, as the mill was some five miles distance from their residence, they could not spare the time to investigate into the matter, and, there being no law to compel a magistrate to certify, we have been obliged to obtain the signatures of Pitts and Ackhurst, both of whom are intimately acquainted with the character and circumstances of O'Connor, and both of whom are doing business in the city of Halifax, where the claimant also carries on his business. We have been waiting for the return of Mr. Hamilton, otherwise we would have forwarded the papers before.

We are,
Your obedient servants,
McDONALD & WITT."

The receipt of this letter was acknowledged, but no further remark made by the agent, which is the principal argument in proof of a waiver, and no further correspondence passed till November, when the following letters were interchanged :—

"*Halifax, N. S., November 17th, 1875.*

B. W. SALTER, ESQ.,
Agent Commercial Union Assurance Co'y.,

Dear Sir,—On the seventeenth day of September last past we forwarded to your office the necessary papers in proof of

O'Connor's loss, under Policy No. 334014. As some sixty days have expired since said date without receiving any reply thereto, (except the acknowledgment of the same), will you please inform me as to what action the Company intend to take in the matter,

And oblige,

Your obedient servants,

McDONALD & WITT,

Solicitors of O'Connor."

"COMMERCIAL UNION INSURANCE COMPANY,

Halifax, 18th November, 1875.

MESSRS. McDONALD & WITT,

Gentlemen,—In reply to your note of 17th, respecting claim for loss made by O'Connor, I beg to inform you that the claim cannot be entertained, and it is not my intention to pay it.

I am, gentlemen,

Your obedient servant,

B. W. SALTER,

Agent Commercial Union Ass'n."

Then followed a notice of appraisement of December 8th, 1875:—

"*Halifax, N. S., December 8th, 1875.*

Dear Sir,—Some time ago we notified you that the property destroyed by fire at O'Connor's mill, and for which claim has been filed, was still remaining upon the premises, and requested you to appoint an appraiser to value the same. Not having heard from you, we now notify you that an appraisement will be made of the said property, on the premises, on Saturday next, at 4 o'clock, p. m.

We are, yours, &c.,

McDONALD & WITT,

Solicitors of O'Connor.

B. W. SALTER, ESQ."

The intercourse between the plaintiff's attorneys and the agent of the Company appears from their examination at the trial.

Mr. Chas. J. McDonald refers chiefly to the form of the notices, and statement of loss, on which there is no question. I have already mentioned what he said about throwing obstacles in his way. He adds that within five days after the loss he understood from Salter that there were some suspicious circumstances connected with it, there having been an insurance also by the Royal Canada Company. Mr. Salter says, that Mr. McDonald pressed him strongly to say that the proof that would satisfy them would satisfy the defendants. "In reply," he says, "I told him that I would refer everything to my solicitors, and that I would not be bound by the act of any other Company. I did say that I thought the proof would be about the same as that required by the Royal Canadian Insurance Company, but I never in any way agreed to forego any of the conditions in the policy. On the contrary, I insisted on their being fulfilled." In his cross-examination he says; "Mr. McDonald told me the place had been set on fire. He said to me, 'you have heard the rumors about the place having been set on fire.' I knew the policy was vitiated on various grounds." This is all the evidence on waiver, written and oral.

Now the plaintiff, in his replication to the 9th plea, pursuing the form in *Bullen & Leake*, 534, as to waiver in the case of a bill or note, which rests on exceptional grounds, avers that the defendants, by express renunciation and waiver, exonerated and discharged the plaintiff from the production of a certificate under the 14th condition, and the defendants ask, where is the proof. Is it in this agent's letter requiring the certificate, or his own uncontradicted testimony that he insisted on all the conditions. I could not but admire the plausible and spirited argument addressed to us on this cardinal point, which wanted nothing to recommend it but a foundation in fact. It had the semblance, I must confess, of abundant material in the strange and inconsistent decisions drawn from all parts of the Union, which swell the bulk of *Bennett's Sansum's* and *Bate's Digests*, and add but little to their real

value, and which, happily for us, cannot perplex us in this Court as authorities. The doctrine of estoppel and waiver, so nearly allied in cases of insurance, is most skilfully treated in *May*, 618 to 621, where he lays down that mere silence is never a waiver, but conceives that when it has the effect of misleading the party, it may operate as such, which it certainly could not in the case we are deciding.

The other two points that were argued so much at large, I shall touch in brief.

There is no waiver pleaded in either, and each will rest upon its own merits. The mill is described in the policy as occupied by Daniel Hughes, and so continued he says until April, 1875, he holding it as his own. The plaintiff then rented the mill to Davis & Co., who worked it for two months, with Hughes as foreman. Davis & Co. left, and after they left it, the mill was vacant more than a month. Hughes says, "I had no charge of the mill after Davis & Co. gave it up. It was vacant until it was burnt." The key remained in his house close by the mill, but he denies that the plaintiff put the mill in his charge, or asked him to take charge of it. But if he had it would have made no difference. Here is a change in the possession of the mill during the insurance, and the premises became vacant by the removal of the occupants who had stopped, that is, I presume, had become insolvent, and the consent of the Company not obtained therefor, under the 5th condition, either of which cases avoids the policy.

With these views, I think it unnecessary to enquire into the title under the articles of 10th October, 1873, and other papers in proof.

The 19th condition, which I have cited, preceded in the policy by the other eighteen, is expressed in unqualified and general terms, but has a restricted meaning imposed on it by *May*, 626, to which I could not assent without seeing the case on which he relies, and which is not within our reach.

On these grounds I am of opinion that we should act on the authority given us by the rule, and direct that the plaintiff become nonsuit.

GAVAZA *v.* BLACK.

THE original plaintiff, who died after the commencement of the suit, the action being continued by his administrators, issued at Annapolis a writ of capias against one Cutler, returnable at Annapolis, directed to the Sheriff of Queens or any other Sheriff, under which Cutler was arrested by the Sheriff of Halifax County, in his bailiwick, and held to bail, defendant becoming surety, and the condition of the bond being that Cutler should be rendered into the custody of the Sheriff of Halifax. The declaration in the suit against Cutler was on a bill of exchange drawn by Cutler and others and dishonoured, and particulars applicable to such a count, together with common counts laying the indebtedness in Cutler and said others, but after issue joined common counts were added laying the indebtedness in Cutler only, and particulars accordingly. Judgment was recovered against Cutler, and an execution issued directed to the Sheriff of Annapolis in the usual form, but without any endorsement specially directing the Sheriff to take the body. No execution was placed in the hands of the Sheriff of Halifax, and the Sheriff of Annapolis, after holding the execution sixty days, returned *non est inventus*.

Held, that the execution had been properly placed in the hands of the Sheriff of Annapolis County in which the venue in the original action was laid, and not in Halifax where the arrest was made; that the objection as to the amendment of the writ could not prevail, as there was nothing to show the nature of the debt sworn to in the affidavit on which the capias issued or that the plaintiff had not recovered on the declaration as originally framed, but that in order to enable plaintiff to bring action against the defendant as bail, a writ should have been placed in the Sheriff's hands with instructions endorsed to take the body of the principal.

THIS was an action against defendant, C. H. M. Black, on a bail-bond to render the body of one Cutler who had been arrested in Halifax County under a capias, returnable at Annapolis where it was issued. The facts of the case were undisputed, and the cause came before the Court on a case agreed upon, which is set out in the judgment of the Court, per SMITH, J., *post*, (q. v.)

Graham, for plaintiff.—My contention is that the execution should issue in the County where the venue is laid, Annapolis the home of the suit. Mr. Rigby contends that it should be in Halifax where the arrest took place. Our execution is different from the English, because it combines all three processes, and the direction to take the body is in the body of it. The endorsement is convenient, but not necessary. The issue of the execution is merely nominal here. It is for notice to the bail, and to enable plaintiff to sue the bail.

Another point taken by Mr. Rigby is that an amendment in the original suit discharges the bail. Now the common counts are in the writ as originally issued, but there were no particulars. The amendment was immaterial. It might be used as an argument why the amendment should not take place, but there is no case to make the fact of the amendment discharge the bail.

Rigby, Q. C.—The conditions of our bail-bond are identical with those on a bail piece on a *ca. sa.* in England, and there it is requisite that the defendant on the bond should have notice that the body is required before action. In England there are the three processes for the three several remedies against land, goods and body, respectively. Our execution requires either one of the three things required by the three several writs in England. If the plaintiff wants any particular thing he must specially direct it. To require the body here an execution specially endorsed should have been left with Sheriff of the County of Halifax, or else the bail would not know that the body was required.

Cites *Sandon* v. *Proctor*, 7 B. & C., 800. This party is arrested in Halifax, and the bond is to render him into the custody of the Sheriff of Halifax. What notice does defendant here get that the body is required? He is notified not that the body is required, but that an execution has been issued commanding the Sheriff of Annapolis to take goods or body, without any special instructions which. Notice must be given by endorsement which process he intends to act under, and whether he wants the body or the goods, and in this case an execution should have been issued in Halifax, specially commanding the Sheriff to take the body.

The amendment of the declaration here after the arrest discharges the bail. The original declaration was for a bill of exchange and on the common counts, with particulars on the bill of exchange. The capias was for the amount of the bill of exchange. Particulars on the bill of exchange were given. The plaintiff amended by adding a count for the goods sold, giving particulars. *7 Taunt.*, 304. The reason of the rule is that the bail may have known that the original defendant could not be liable on the bill of exchange for want of stamps, &c., and may have entered into the bail on that understanding. To allow a count to be added for the goods which were the consideration of the bill of exchange might change the liability that the bail agreed to assume.

(YOUNG, C. J.—Your position is that the addition of the counts and particulars setting out the goods sold and delivered discharges the bail.) *Rigby, Q. C.*—That is my contention. (YOUNG, C. J.—That would be going a long way. What is the

verdict found for?) *Rigby, Q. C.*—It is for the whole declaration. The presumption is that the verdict was found not on the bill of exchange, but on the consideration of it, or else they would not have amended. Suppose the bill of exchange was withdrawn from the jury, Black could not certainly be held liable, because he was bail only for the bill of exchange. Cites *Cockran's Reps.*, 19.

Graham.—On the point that the execution was issued into the proper county and given to the proper sheriff, see *1 Ch. Arch.*, 777, 886; *Tidd's Prac.*, 1098. In a Canadian case the whole question is argued by the Court; *5 U. C., Q. B.*, 72. The practice in England is not to render him to any particular county, but to a particular prison.

The amendment does not affect the liability of the bail. A writ of *capias* may be amended. Mr. Rigby could have shown cause against the amendment if he thought it would prejudice the bail. (McDONALD, J.—There was no person there representing defendant at that time.) Yes. They are identified to that extent. The amendment here does not prejudice the bail at all. Amendments are allowed every day without reference to the bail. Where a capias is defective it will be amended, but the same argument would apply in that case as to the change in the position of the bail. The only amendment here is the addition of particulars on the common counts. The particulars are not essential. The only effect of the want of them is to prevent plaintiff from getting final judgment. As long as the amount was not increased the bail should not complain.

The endorsement on the execution is not essential. The execution itself is a conditional order to take the body if there are no goods. If the notice was on to take the goods it would be otherwise.

(SMITH, J.—Suppose there were goods and chattels, could the Sheriff under that execution take the body?) I don't say that he can, but men are frequently arrested where they have land. The return here states that he could not find the body; that shows that he had exhausted the goods.

Rigby, Q. C.—The original suit was against Cutler, McLean & Co., by whom the bill was signed; the consideration concerned Cutler alone, to whom the goods were sold.

SMITH, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This is an action brought by Thomas A. Gavaza, on the 24th April, 1876, against the defendant, Charles H. M. Black, upon a bail-bond, executed by the said defendant, and one James H. Cutler. After issue joined the said Gavaza died, and the present plaintiffs, Norman A. Gavaza and T. Millege Gavaza, his administrators, were by suggestion, made the plaintiffs on the record.

The facts apparently being undisputed, and the right of the plaintiffs to recover resting solely on questions of law, a case was agreed upon by the counsel, which was submitted to, and argued before the Court during the present term.

The facts, as presented by said case, are as follows:—The said James H. Cutler, on the 10th day of March, 1874, was arrested in the County of Halifax, by the Sheriff of said County, under a writ of capias, returnable at Annapolis, and directed to the Sheriff of Queens County, or to any other of our Sheriffs, and issued at Annapolis the 2nd March, 1874, at the suit of the said Thomas A. Gavaza, deceased. The said Cutler was released by the Sheriff of Halifax upon his giving the said bond, and a return made accordingly.

In the original suit, namely, the said suit of Thomas A. Gavaza against the said James H. Cutler, the venue was laid in Annapolis County, and after trial a judgment was recovered for $665.43, debt and costs, which was entered up in said County on 23rd June, 1875, but neither was the said judgment satisfied nor the said Cutler rendered in accordance with the condition of said bond. Previously to the issue of the writ in this cause, on the 25th January, 1876, an execution was sued out upon said judgment in the original suit against said Cutler, directed to the Sheriff of the County of Annapolis to be executed, and it remained in his hands for the period of sixty days, thereupon he returned to the said Court that the said Cutler could not be found within his bailiwick. The defendant then resided in Queens County. No execution upon said judgment was placed in the hands of the Sheriff of Halifax and the execution placed in the hands of the Sheriff of Annapolis contained no endorsements or directions to take the body of the said Cutler. The bail-bond was duly

assigned by the Sheriff of Halifax to the said Thomas A. Gavaza before action brought when he returned the writ of capias. It moreover appears by the case and exhibits, that on the 29th April, 1875, after issue joined, an order of a Judge was obtained for leave to amend the declaration. Previous to said amendment the first count of plaintiff's declaration set out that the defendant was one of the firm of Cutler, McLean & Co., doing business in Boston, in the United States of America, and that by their order for the payment of money directed to Messrs. F. and L. Burnaby, in Milton, N. S., they required them to pay the plaintiff $509.98, which said order being duly presented for payment was dishonoured. Then follow the common counts alleging the indebtedness of said Cutler, McLean & Co., to the plaintiffs. The amended declaration contains the common counts laying the indebtedness in Cutler, and varying the particulars from those previously furnished, which applied to the order only, by rendering them applicable to such added counts. The amount of claim remained the same, with the exception of $15.77, claimed in the first particulars for interest and expenses incident to the dishonor of the order.

It was contended at the argument by the defendant's counsel that the bail in this case was discharged.

1st. Because the arrest of Cutler, the original defendant, being made at, and by the Sheriff of the County of Halifax, and the condition of the bail-bond being that he should render himself, or be rendered by the defendant Black, into the custody of *said Sheriff of Halifax*, the execution should have been sent to such Sheriff.

2ndly. That the amendment of the declaration altered and increased the liability for which he had engaged to be responsible and for which the defendant, Cutler, was holden to bail.

3rdly. That there was no indorsement on the execution lodged with the Sheriff of Annapolis, directing him to take the body of Cutler.

I do not think the first ground taken can be sustained; and I come to this conclusion after a careful review of the authorities upon this important point of practice. In the 9th edition of *Tidd*, 1098, it is laid down that "the *capias ad satisfaciendum* against the principal should be directed to the

Sheriff of the County where the original action was laid." *1 Ch. Arch.*, 886, is an authority the same way. In delivering judgment in *Robertson* v. *Goin et al.*, 5 U. C., Q. B., 77, a similar practice is recognized by JONES, J. He says; "the most convenient district for the bail to watch proceedings against the principal is that in which the venue is laid, and not in which the recognizance is taken; * * * * * for although the recognizance of bail may be taken in any other district, the place where the bail must watch or search proceedings to ascertain whether the *ca. sa.* has been issued would naturally be where the proceedings have been carried on. It cannot be required that the plaintiff should issue his *ca. sa.* in any other district, although the arrest may have been in another district, and the recognizance of bail be that the surrender shall be to the Sheriff of such district." I have no doubt but that the execution was properly placed in the hands of the Sheriff of Annapolis.

The second ground taken on behalf of the defendant would have presented much difficulty in the plaintiff's way had the facts of the case been furnished the Court in such a manner as to justify the application of the sound and reasonable proposition of law laid down by defendant's counsel. The case of *Wheelwright* v. *Jutting*, 7 Taunton, 304, establishes the principle, "that bail are not liable on their recognizance for any cause of action which is not stated in the affidavit whereon the defendant is holden to bail." And PARKE, B., very properly says, "I may agree to be bail for a friend on a bill of exchange, yet if he has been extravagant in taking up clothes from a tailor, I may say I choose to have nothing to do with it."

With this law I quite concur; it is but common sense and justice; but the facts in connection with the case are not so presented to us as to enable us to say whether this decision is in point. In that case the plaintiff had arrested the defendant, and in his affidavit to hold to bail he had not stated that the defendant was indebted to him on any other cause of action than on a bill of exchange. In his declaration he added a count for goods sold and delivered, (as in this case.) He obtained a judgment by default, and upon the execution of a writ of enquiry, he *recovered for the goods sold*, which were,

in truth, the consideration of the bill, and *he gave no evidence on his count on the bill*, and the counsel there contended, and very properly, that the plaintiff. having failed to prove the debt in the original action, for which alone the bail were responsible, it could not be made to cover another debt, thereby transferring the liability of the bail to a debt for which they never engaged themselves. If the case here prepared, and from which alone we can gather the facts, had afforded us evidence of the nature of the debt sworn to *in the affidavit upon which the capias issued*, and had furnished some light with regard to the evidence given by the plaintiff at the trial of the original suit, or upon which count he obtained his judgment, the case of *Wheelwright* v. *Jutting*, might, or might not, be applicable. At present we are unable to ascertain It cannot for a moment be urged, I apprehend, that the mere fact of the addition of a count in a declaration, which may be abandoned, or under which no evidence may be offered at the trial, would discharge the bail. There is nothing before us to shew that the plaintiff resorted to his added count, and, therefore, *non constat* he may not have relied on his writ as originally framed and recovered for the very debt the bail engaged to become responsible for. For these reasons, I think this objection cannot prevail.

The point of practice raised by the defendant's third ground is one of much importance, and in the settlement of which little if any aid can be obtained from English decisions. Our writ of execution is grounded on the Provincial Statute of 1758, 32 G. 2, cap. 115, and may be considered as a combination of the *fieri facias* and *capias ad satisfaciendum*, under which the Sheriff is authorized to do what in England would require three writs to accomplish. Our colonial practice has dispensed wisely with this variety of forms, the real estate being put generally on the same footing as personal estate. This being the case we have now to consider whether an execution issued and placed in the hands of the Sheriff, with no other directions than those contained in the body of the writ, and returned by the officer *non est inventus*, is sufficient to fix the bail. The purpose the law has in view in requiring a *ca. sa.* to issue is obvious, namely, that the bail should be informed *beyond doubt* that the judg-

ment creditor intends to proceed against *the person* of their principal, and with this object, in England, the writ of execution must be entered in a book kept in the Sheriff's office for that express purpose. The law is clearly and succinctly laid down in *Chitty's Arch.*, vol. 1, p. 674, thus; "The bail are not bound to render their principal until they know from the *species of execution* the plaintiff may think proper to adopt, whether he intends to proceed against the person of their principal or not." *7 B. & C.*, 800, is also an authority to this effect. In the *ca. sa.* thus placed in the hands of the Sheriff, there is clear, unmistakable information afforded the bail of the intention that the plaintiff is looking to the person of their principal; it is impossible to be deceived. But does our writ of execution without endorsement apprize the bail with any degree of certainty that the person of the principal is intended to be proceeded against? This can hardly be contended when we examine its language. The Sheriff is directed, *first*, "that of the goods and chattels, lands or tenements of the said James H. Cutler, within your precinct, you cause to be paid and satisfied unto the said Thomas A. Gavaza, the aforesaid sum, &c., and *for want of goods, chattels, lands*, or tenements, &c., we command you to take the body of the said James H. Cutler." Under such instructions only, it is the universal practice to seek, in the first place, for goods and chattels of the execution debtor whereon to levy, and that there is anything in the language I have quoted indicative of the intention of the plaintiff to abandon any goods and chattels the principal may have had, and to look to his person, I conceive it would be useless to argue. It is true the law does not require *in express terms* that the directions should be indorsed on the writ, or that other than those contained in the body of it shall be given. Neither does it destroy the necessity of that ample notice to the bail of the intention of the plaintiff, the very object sought to be secured by the writ being placed in the hands of the Sheriff a prescribed number of days before its return. By the 265th sec., cap. 94, R. S., 4th series, it is rendered "competent for the party suing out the writ of execution to direct by indorsement in what manner it is to be executed, which direction the officer must obey." Does this not mean to meet the difficulty which might reasonably occur from the

peculiar nature of our writ of execution? If it were simply a writ of *capias ad satisfaciendum*, no further directions could possibly be required than those embodied in it. At all events, justice as well as law, requires the bail to be protected, to the extent, at least, of enabling him to do that which he has engaged to do, *i. e.*, to render his principal when notified of the plaintiff's intention to look to his person. I am of opinion that the plaintiff cannot recover in this action, on the third ground taken by defendant's counsel at the argument, and that a judgment of non-suit must be entered according to the terms of the case submitted.

SIR WILLIAM YOUNG, C. J., mentioned a circumstance not adverted to in the argument, namely, that the writ was issued at Annapolis, and the bond taken to render the debtor at Halifax. It required the render of the debtor in a county into which the writ was not returnable. He doubted if any action would lie on such a bond, and said that all the members of the Court concurred as to the necessity of special indorsement.

McKAY *v.* BONNETT.

PLAINTIFF brought action against the defendant, a Sheriff, for the seizure and sale of a horse on an execution against one Nicholson who had some time before the seizure been the real owner, although when taken the animal was in the possession of the plaintiff, who claimed it under an alleged purchase. Defendant's attorney testified that before seizure plaintiff had told him the horse belonged to Nicholson, and that on the faith of that statement the Sheriff had been induced to seize. Before the sale, however, plaintiff notified the Sheriff that the horse was his.

Held, reversing the decision of the County Court, (at Annapolis,) that the plaintiff was not estopped by his representation, and the defendant's having incurred expenses in feeding the horse, &c., in consequence thereof, from setting up the truth as to the ownership of the horse.

McDONALD, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This is an appeal from the decision of the learned Judge of the County Court, at Annapolis, in an action against the defendant, who, as Sheriff, seized and sold the horse in question, under an execution against one Nicholson; and it appeared at the trial that some time before the seizure Nicholson was the real owner, although, when taken the animal was in possession of the plaintiff, who now claims it as owner, under an

alleged purchase from Nicholson. Mr. Mills, the defendant's attorney, testified that the plaintiff told him the horse belonged to Nicholson, and not to himself, and that, on the faith of that statement, the Sheriff was induced to take and sell the animal. Mr. Mills' clerk also corroborated him in his statement of the conversation. A notice to the Sheriff demanding the horse before the sale was proved, on behalf of the plaintiff, and it was read. The learned Judge decided in favor of the defendant, solely on the ground that the plaintiff was estopped from disputing the ownership, after having represented to Mr. Mills that Nicholson, and not he, was the real owner, the Sheriff having seized and fed the horse, and thereby incurring some expenses in consequence of what the plaintiff said. If the learned Judge had decided this case in favor of the defendant on the ground that Nicholson was the real owner, as I think he would have been justified in doing, or if we had the power now to give effect to the evidence in that way, future enquiry might be avoided; but that power we have not, under the statute, and, therefore, our present enquiry must be confined to one question, namely, is the plaintiff estopped from setting up his claim as the true owner of the property.

In the well known case of *Pickard* v. *Sears et al.*, 6 Ad. & E., 469, the rule of law was held to be clear, that, where one by his words or conduct wilfully causes another to believe the the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the time, and that the plaintiff's conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought to have been taken, whether he had not in point of fact, ceased to be the owner." The case of *Freeman et al., Assignees, &c.*, v. *Cooke*, 2 Exch., 654, was trover by the plaintiffs, as such assignees, for the conversion of goods of the bankrupt before the bankruptcy. The defendant pleaded not guilty, not possessed and license. The defendant was Sheriff of Yorkshire, and his officers had seized the goods in question under a writ of *fi. fa.* against Joseph and Benjamin Broadbent. William Broadbent, in anticipation of a distress, removed the goods to the house of his father, Joseph, and

afterwards to the house of his brother Benjamin. When the officers entered Benjamin's house the bankrupt told them that they were the property of Benjamin, supposing that the writ was against himself. The writ, on being produced, was found to be against Benjamin, and then William told the officers that the goods belonged to another brother, and finally that they were his own. The jury found that the goods were those of the bankrupt, but also that he represented them to the officers as the goods of Benjamin, *so as* to induce the officers to seize them. The question was whether the finding was sufficient to estop the bankrupt and the plaintiffs as his assignees, and it was decided in the negative. PARKE, B., said, that by the term "wilfully," as used in the rule, "we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and *believe that it was meant that he should act upon it, and he did act upon it as true*, the party making the representation would be equally precluded from contesting its truth." * * * * "It is not," he said, "found that he *intended* to induce the officers to seize the goods *as those of Benjamin*, and whatever intention he had in his first statement was done away with by an opposite statement before the seizure took place; nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taking it altogether."

In the case of *Howard* v. *Hudson*, 2 El. & B., 1, CROMPTON, J., endorses the construction of the word: "wilfully," as given in *Freeman* v. *Cooke*, and says that "as the rule is there expressed, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, or with the intent to defraud, but so far wilfully that the party making the representation, on which the other acts, *means* it to be acted upon in that way." He adds "that is the true criterion." EARLE, J., put the case very pointedly, thus; "Did the defendant make a misrepresentation to the plaintiff, *with intent that the plaintiff should act upon it*, and did the plaintiff, in consequence, so act upon it to his prejudice?"

In all the cases decided on questions of this kind, so far as I read them,—and they are, as I think, consistent,—it appears to be conceded that it is necessary, in order to estop one from setting up the truth, that his declaration, or representation, which includes his conduct, to the contrary, should be shown to have been such as to lead a reasonable person to believe that *he meant* that his representations should be acted upon accordingly, to the prejudice of the party setting up the estoppel. I cannot think that such was the case here, any more than in *Freeman* v. *Cooke*, and I do not think that the facts in evidence were such as to justify Mr. Mills or the Sheriff in coming to the conclusion that the plaintiff meant that the horse should be seized and sold in the manner proved. So nicely is the distinction drawn on the point of intention that, in the case of *Freeman* v. *Cooke*; although the jury found that the party represented the goods to be those of a wrong person, "*so as* to induce the officers to seize them," yet it was held by the Court that it was not found by the jury that he *intended* to induce the officers to seize the goods as those of the wrong party; and for that, among other reasons, he was not estopped from setting up his claim. There is very little doubt, in my mind, that in *Freeman* v. *Cooke*, as well as in this case, the intention at the time of making the representations, was, not to induce the officers to levy upon the goods and take them as the goods of the wrong parties, but rather to prevent them from being taken at all. Although it appears that the Sheriff took the goods in question, *in consequence* of what the plaintiff said to Mr. Mills, yet, before the sale, the plaintiff asserted his rights, told the truth, if truth it was, while the defendant had it in his power to save himself, by restoring the property, if he thought fit. If the plaintiff had brought his action for the mere taking of the horse, and before the notice was served, and before the sale took place, I think the defence would have been stronger, although I do not say sufficient, but the Sheriff sold the animal with as much knowledge of the facts as the officers had in the case of *Freeman* v. *Cooke*.

Bigelow on Estoppels, in a note at page 576, notices a case decided in a New York Court of Appeals, thus stated: "T.'s name was forged to a note, and M., after he had advanced

money on it, enquired of T. concerning it, and T. so spoke as to induce M. to advance more: Held that the forgery was a defence to T., only as to the first advance." If, in this case, with a full knowledge of what was being done, the plaintiff had permitted the horse to be sold by the defendant without demand and without notice of his claims there can be no doubt he would be estopped, because, in that case, his conduct throughout would have been ample evidence that he *meant* that the Sheriff should sell; but, as it is, although his declaration to Mr. Mills is evidence that he did not tell the truth at the trial, and that therefore the property in question is not his, but Nicholson's, yet he was not precluded from setting up the real truth then, and I am, therefore, of opinion that the case will have to be decided in the County Court, under the evidence, upon the question of fact as to the true ownership of the horse, without the plaintiff being estopped from proving the truth, if the truth be that he is the real owner.

GRANT *v.* SIMPSON.

DEFENDANT used, in reference to plaintiff, the words "stud" and "mare-rider," for which plaintiff brought an action of slander, with an *innuendo* attributing to the words the meaning that plaintiff had committed the crime of buggery. The Court set aside the first verdict on the ground that the words were not actionable *per se*. On the second trial the only evidence adduced by way of foundation for the question as to the sense in which the words were understood was that of rumors in the neighbourhood that the plaintiff had committed such crime, but it was not shown that these rumors were known to the defendant.

Held, that the evidence had been improperly admitted, and that the verdict for plaintiff must be set aside.

THIS was an action of slander, tried in Guysboro', in October, 1877, before Mr. Justice WILKINS, in which a verdict was found for the plaintiff with $20 damages, a previous verdict in favor of the plaintiff having been set aside. The plaintiff, in his declaration, set out that the defendant had used the words "mare-rider," and "stud," in reference to the plaintiff, meaning that the plaintiff had committed the crime of buggery. The cause was argued this term, before SIR WM. YOUNG, C. J., and DESBARRES, SMITH and JAMES, J J., on a rule *nisi* to set aside the verdict.

DesBarres, in support of rule.—The words, "mare-rider," are not actionable *per se*. To be so, the words must convey the charge imputed to them without requiring an *innuendo*. They are to be taken in their ordinary sense, and it lies upon the plaintiff to shew that they were used in a scandalous sense. *2 Addison on Torts*, 444. There is no special damage proved or even alleged. There is no proof that the words were spoken in any different from the ordinary sense. *Addison on Torts*, 346; *Folkard on Slander and Libel*, 80; *3 H. & N.*, 379.

The words, "you are a stud," are not actionable *per se*. (*Per Curiam*. They may impute ungoverned passions, but not the crime here attributed.) Chisholm is the only witness who speaks to the words, "mare-rider." His evidence as to what he understood by the words was not admissible, as no foundation was laid for it; *3 Exch.*, 200. The question should first have been put, was there anything to lead you to suppose the words were not used in their ordinary sense. In *16 M. & W.*, 441, it is laid down that the words are to be construed as they would be fairly understood by by-standers unacquainted with the matter to which they relate.

The Judge misdirected the jury, because he did not tell them whether or not these words were capable of the meaning attached to them, and tell them to find whether they were used in that sense. Evidence was wrongly admitted of words used after action brought; or if it was admissible, the jury should have been warned not to let it affect the damages.

Here is a general verdict. The declaration contains two counts; that setting out the words, "mare-rider," cannot stand, because it is bad, and therefore the verdict cannot stand. *Folkard on Slander, &c.*, 492; *1 A. & E.*, 534.

Graham, contra.—*Folkard*, on page 85, lays down the law as to slander and libel where the words are of doubtful or innocent meaning on their face. As to laying the foundation for questions as to the sense in which the hearers understood them, see *Folkard*, 445. The sense in which the hearers understood the words is the sense that governs. The evidence of Chisholm shews clearly grounds for the meaning attributed by him to the words, "mare-rider." The previous rumors referred

to in the evidence form a foundation for the questions as to the meaning. *Bowers* v. *Hutchinson*, Oldright, 681; *L. R., 10 C. P.*, 503; *6 H. & N.*, 661.

Where words have a doubtful meaning there is no distinction laid down in the books between libel and slander. The jury having found upon the meaning of the words, it is not for the Court now to say what they mean.

Cites further *Folkard*, 443; *16 M. & W.*, 445; *James' Rep.*, 371, *Folkard*, 448 and 570.

DesBarres., in reply.—The witnesses here were not competent to interpret the words used, on account of having heard the previous rumors. The *dictum* of POLLOCK, C. B., in the case already cited from *16 M. & W.*, is strong on that point. Cites *10 Q. B.*, 899.

SMITH, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This is an action of defamation, tried at Guysborough, at the October sittings of the Supreme Court, 1877, before Mr. Justice WILKINS, and in which a verdict passed for the plaintiff, with $20 damages. A rule was taken out to set aside said verdict. There are two counts in the declaration setting out the words alleged to have been spoken by the defendant, as follows:—*First;* "you are a mare-rider," meaning that the plaintiff committed the crime of buggery with a mare. *Second*, "You are a stud," averring the same meaning to the words. This cause had been previously tried, but no evidence was given in support of the innuendoes. A verdict on that trial was also given for the plaintiff, which, after argument before this Court, was set aside. It was then unanimously held by the Court that the words spoken by the defendant, as set out in the plaintiff's declaration, would not bear the construction put upon them, and were not *per se* actionable.

With this decision before us, we are to enquire in what respect the evidence given at the second trial varies the case now presented to us from that on which the judgment of the Court has already been given. If the evidence admitted by the learned Judge at the trial, explanatory of the sense in which the witnesses understood the words used by the defendant, was properly received, then, beyond doubt, the

verdict cannot be disturbed; but, on the contrary, if improperly received, the rule must be made absolute on the authority of the decision of the Court to which I have adverted. Unquestionably, the meaning of the defendant when using the words complained of, is a question of fact, to be decided by the jury, where the words are capable of bearing the construction put upon them; and where the words spoken, or the meaning of the terms employed, are ambiguous, and it is doubtful in what sense the speaker intended them, the question is in what sense the hearers understood them. It is so laid down in *Folkard on Slander and Libel*, p. 445. This author also says; "the ordinary meaning of the words used, (whether written or spoken,) is to be taken to be the meaning of the utterer, unless they are explained to import something different from their obvious meaning by previous occurrences, conversations or other matters having been introduced." This author likewise says, at the same page, "in the absence of any such evidence, a witness cannot be asked the question, 'What did you understand by those words?' nor, 'What did you understand with reference to such an expression?' The proper course is, first, to lay a foundation for a question of the kind, giving some such evidence as above stated, and then the questions may become admissible." In support of this proposition the case of *Daines et al.*, v. *Hartley*, 3 Exch., 200, is cited. I have carefully perused this case, and find it thoroughly supports the text. That the words used by the defendant here cannot "in their ordinary sense" mean that the crime alleged in the innuendos was committed by the plaintiff must be obvious. The Court has so decided. Then what are the "previous conversations, occurrences, or other matters introduced" in proof, to use the language of this authority, which give to the utterer of these words a meaning different from what the law conveys to them?

The evidence of Alexander Chisholm and that of William Grady is relied upon to sustain the innuendoes in plaintiff's declaration, that is, to give a meaning to the words as they understood them. None of the elements to constitute the foundation for the admission of their testimony, as laid down by the authority referred to, is to be found in the learned Judge's minutes. Chisholm says, "I understood defendant by the words to intimate, and I so understood them, that there

in that place," referring to the place pointed out to him by the defendant in his conversation with him, when he stated he had seen plaintiff riding a mare, "plaintiff had had criminal intercourse with a mare." "I was more led," he says, "to that conclusion, by the fact that there had been before a talk in the neighborhood to the effect that plaintiff had committed, or attempted to commit, that crime." Grady says; "defendant called plaintiff a d——d stud," and adds that "he," witness, "had before this heard a rumor that plaintiff had had criminal connection with a mare, and he understood the words used by the defendant in a particular sense. He understood that defendant, by the words, meant to intimate that plaintiff had been guilty of that crime." It is not shewn that this rumor was known to the defendant, and the reason which obviously influenced the minds of these witnesses in giving to the words used the meaning they assigned to them, may have been, and we may presume was, for the want of evidence to the contrary, absent from defendant's mind. It is unnecessary for me to express an opinion how far the knowledge of such a rumor, if brought home to the defendant, would justify the admission of this testimony; it is sufficient to say that it might legitimately be the subject of discussion. We must, however, deal with the facts as we find them, and, giving to the words their obvious and ordinary meaning, or even regarding them as ambiguous, consider whether the learned Judge was right in receiving such testimony under the well recognized principles of law I have referred to. The possibility must be manifest to any one, from the evidence, that had these witnesses not been cognizant of the rumor they testify to, the words used might not have reached their understanding in the sense they appear to have done. I cannot understand the law to be that words not actionable in themselves can be assigned a meaning by witnesses, resting upon the knowledge of some facts and circumstances, known to themselves, and of which the utterer of the words may be entirely ignorant. This would be rather a dangerous doctrine to uphold. I think the evidence of rumor should not have been received, as having no bearing on the case; and, although admitted, that it furnishes no foundation which would justify the reception of the testimony as to what the witnesses understood to be the sense in which words, *per se* not actionable, were spoken.

The Court undeniably will, as a general rule, where words may be taken in a double sense, construe them, after verdict, in that sense which may support the verdict. This was urged upon us at the argument, but the authority cited by plaintiff's counsel, *Folkard*, hereinbefore noticed, p. 571, also says, "*provided they are fairly susceptible of that meaning*," and he adds, "if the Court should afterwards be of opinion that the matter charged is not libellous, judgment will be arrested, whether on indictment or a record in a civil suit."

In view of the previous decision of this Court, and of the evidence received by the learned Judge at the trial of this cause, I think the rule must be made absolute, with costs.

JAMES, J.—The word "horseman" is innocent, "mare-rider" is the same. But if the defendant calls the plaintiff a stud and a "mare-rider," and calls him so repeatedly on various occasions, says he saw him riding a mare when he did not think he was seen,—putting it all together, it conveys the insinuation that he, defendant, had committed the abominable crime. They import almost necessarily such an impression. Therefore, although with great deference to the opinion of the Court,—this is the second decision on the question,—I feel bound to express doubt as to the soundness of that decision, and I would not feel justified in doing anything less than mentioning that doubt. Not having heard the first argument, in which the case was more fully presented to the Court, some points having in the second argument been but slightly dwelt upon on account of their having been fully gone into on the first argument, I am not in a position to say that I dissent from the decision of the Court. The words were spoken in terms of reproach, and, reading the language as given in evidence, it seems to import almost conclusively the meaning attached to it by the plaintiff. I do not at all dissent from the principles laid down by the Court, assuming the words to be ambiguous.

SIR WILLIAM YOUNG, C. J., said that on the second trial rumors had been introduced in evidence that should not have been received at all, and as these had affected the verdict it should be set aside.

DESBARRES, J., concurred in the view just presented by the learned Chief Justice.

IN RE DARTMOUTH SCHOOL ASSESSMENT.

THE Act incorporating the town of Dartmouth provided that the Town Council should have jurisdiction over the support and regulation of the public schools, regulating the assessments, collecting the assessments, and that they should vote, asses, collect, receive, appropriate and pay whatever moneys were required for county assessment, poor, school and other rates and assessments, and should have within the town all the powers relating thereto vested in the Sessions, Grand Jury, School Meeting and Town Meeting. By another section it was enacted that, after the passing of the Act, the town should be set off into a separate school section, and should have the expenditure of all rates raised within its limits for the schools of the town, as also of all Government and School Grants for such schools, which grants should be paid to the town.

Held, that notwithstanding these enactments, the Town Council was bound to assess and pay over to the County Treasurer its rateable proportion of the assessment of thirty cents per head provided for by R. S., cap. 32, sec. 52.

A DISPUTE having arisen between the County of Halifax and the Municipality of Dartmouth in reference to the school assessment, the following case was submitted by the Sessions for the judgment of the Court and argued this term.

Case submitted for the opinion of the Supreme Court by the Court of Sessions of the County of Halifax, in accordance with the provisions of chapter 20, Revised Statutes, 4th series, sections 6 and 7.

By section 52 of chapter 32, Revised Statutes, in order to raise funds for the support of Public Schools, it is enacted as follows:—

"The Clerk of the Peace in each county, except as hereinafter provided in relation to the City of Halifax, shall add to the sum annually voted for general county purposes at the general sessions, a sum sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every inhabitant of the county, according to the last census preceding the issue of the county rate-roll, and the the sum so added shall form and be a portion of the County rates."

In May, 1876, the Clerk of the Peace for the County of Halifax added to the sum voted for county purposes for that year the sum of $8,847, being an amount sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every inhabitant of the County of Halifax outside the City of Halifax, according to the last census.

On the tenth of May, 1876, the warden of the municipality of Dartmouth made a return to the said Clerk of the Peace of the value of the property within the municipality on which the assessments were to be levied for that year, viz., $1,223,455

In accordance with the provisions of chapter 24 of the Acts of 1872, the said Clerk of the Peace apportioned the amount required to be assessed for county purposes among the different districts, and among others the sum of $4510 to be assessed on the property in the municipality of Dartmouth, which amount included the thirty cents per head for county school tax.

The said apportionment was approved by a Committee of the Sessions on the 26th May, 1876, and the Town Council of Dartmouth was required to assess and collect the said sum of $4510 for county, school, and other assessments, in accordance with the provisions of chapter 17 of the Acts of 1873.

The Town Council of Dartmouth, although willing to assess the municipality for ordinary county rates and taxes, have refused to assess or collect the county school rate imposed under the provisions of chapter 32 Revised Statutes, on the ground that under chapter 17 of the Acts of 1873, the Council has the right to assess, collect, and expend all school rates within the municipality, without reference to the Court of Sessions or Clerk of the Peace for the County of Halifax, and that the municipality is exempt from the county school assessment.

The opinion of the Supreme Court is asked on the following point:—

Is the Town Council of Dartmouth, or are its assessors and collectors, legally obliged to assess and collect, within the municipality, its proportion of the county school rate imposed by section 52 of chapter 32 Revised Statutes, and pay the same over to the County Treasurer of Halifax?

(Sgd.) JAMES THOMSON,
Custos of County of Halifax.

McCoy, Q. C.—We say that the case cannot be argued here.

Ritchie, Q. C.—Here is a rule ordering it to be argued.

McCoy, Q. C.—That is only an *ex parte* rule. We take the preliminary objection that the cap. 20, R. S., sections 6 and 7 only apply to the clauses that immediately precede. They do not apply to civil proceedings, but only where questions of law arise under the previous section. The Sessions can try certain indictments, and it is very proper that they should, on such matters, have the power to get an opinion of the Court. Cap. 94, R. S., sec. 225, is the only authority under which a case of this kind could be brought here, and that requires that the case be between real parties, and that they should consent. Under the practice contended for, a case may be brought here, as this is, containing views against which one of the parties protests.

YOUNG, C. J.—We will note your objection.

Ritchie, Q. C., refers to *R. S.*, cap. 32, section 52, quoted in the case. There are three ways of supporting public schools; one, the Government grant; the next the County assessment, which is distributed *pro rata* according to attendance at the schools, and the third is the local assessment.

We say this county assessment extends to Dartmouth. Under the R. S. the city is the only place exempt. But Dartmouth claims exemption under its own Act of Incorporation, 1873, cap. 17. See sections 27, 28. The last of these sections refers specially to this very county school rate, as distinguished from their local rate, which is referred to in another section. Sections 31 and 32 refer simply to the duties of the collectors to collect the rates. Sections 36 and 37 apply to the local school rates and the school rates for the district. These apply solely to the local school rates. You will perceive that for school purposes Dartmouth is larger than for ordinary municipal purposes. For school purposes it includes portions not included in the municipality.

They contend that under section 36 they have the handling of their own money, that under that section the whole of the money they collect is subject to their own distribution.

Section 37 distinctly recognizes the county school assessments. It says they are to collect the county school assessment in the portions outside of the town between the town and the Imperial property and Herbert's Brook, respectively.

The town is to assess it and pay it over to the county under R. S., cap. 32, sec. 52.

They claim to be situated just the same as the city of Halifax, which is excepted specially by the Revised Statutes. We say that they are to pay the amount into the county fund, and the only difference made by the Incorporation Act is that, whereas formerly it was paid to each school in proportion to attendance, it is now to be paid over in a lump to the town of Dartmouth, according to the gross attendance at the schools collectively, and it is distributed as they see fit. That is the whole effect of those sections.

Motton refers to preliminary objection. We contend that if it was contemplated that this section providing for a case to be made should apply to taxes, the town of Dartmouth is in exactly the position of an individual ratepayer. Now it could not be contended that a dispute with an individual rate-payer could be referred to the Court under a case prepared without the concurrence of the party, as contended here with respect to the town. This section does not refer to assessments at all. If it were to apply to the assessments it would have said so. The legislation upon the subject of school assessment is just as distinct as if it were not in this chapter at all. It is always kept separate throughout. It could never have been contemplated that in such disputes the sessions should have the power to make a case, as that would throw into the hands of an adverse majority a power which the Legislature never could have contemplated. The majority of the sessions must always be hostile to a section claiming to be exempted or relieved. The sessions had a right to sue the individual rate-payers. Dartmouth does not stand in any different position from an individual rate-payer or collector who refuses to pay over money.

I will show that the town of Dartmouth is already taxed oppresively for schools. In the county the valuation is merely nominal. The valuation in Dartmouth is entirely different. (MCDONALD, J.—Have the sessions anything to do with it at all?) Certainly not. When a question of law arises in the sessions in regard to the discharge of their judicial duties in trying indictments, they may apply to the Court for the opinion of the Court. The section providing for a case

immediately follows that in regard to indictments, and is connected with that section. The 5th, 6th and 7th sections of of cap. 20, R. S., are to be read in connection, and the last section is to be limited to the subject of the previous ones, otherwise the sessions could send all kinds of questions to the Court to be decided, and the Court could be entertained from term to term with questions relating to the election, for instance, of all officers from the Custos, &c., to a hog-reeve.

The town of Dartmouth is entirely cut off from the county. We have all the powers of the Court of Sessions, and are practically entirely distinct from the county. The town has taken in, by section 37, two small districts that the county has thereby been relieved of. The town pays all its other county rates, but claims to be exempted, as the city is, from from the county school assessment. Section 28 of the Incorporation Act says, "they," (that is the Council,) "shall vote, assess, collect, receive, appropriate and pay whatever moneys are required for county assessments, poor, school and other rates and assessments." And it gives them all the powers relating thereto, vested in the Sessions, Grand Jury, School Meeting and Town Meeting, and all the powers and authority which within the district previous to the passing of the Act of Incorporation were exercised by the Sessions, Grand Jury, or Town or School Meeting.

What have the sessions to do with it in view of this section? Where is the power of the sessions to send up a case claiming that we shall pay this money? The town has larger powers than the sessions. It has all the power of the sessions, and others that the sessions do not enjoy. Section 27 gives the Council control over the support and regulation of the public schools, the regulation of the assessments, and collection of the assessments. We claim to have the entire control of the educational funds collected in the town. Sections 36 and 37 of the Act of Incorporation provide that the town shall be set off into a separate school section, and shall have the expenditure of all school rates raised within its limits for the schools of the town. We can impose and collect such taxes as we please.

YOUNG, C. J.—You partly repeal the School Law and the County Assessment Act.

Motton.—This was fought out in the popular branch, a declaratory act having been brought down which the House refused to pass.

McCoy, Q. C.—Dartmouth stands in a different position from the rest of the county. It is entirely set off, and the Act of Incorporation gives the whole control in school matters, the collection and appropriation, to the Town Council.

If a collector refuses to account to the sessions, can the sessions make a case? If not, how can they make a case to compel the town of Dartmouth, which, under their view, is a collector? How can the decision be enforced if adverse to the town? There is nothing in the statute to enable the judgment to be enforced, and that is the reason why the concurrence of both parties is required to make a case. The only remedy is for the County of Halifax to sue the town if its view of the statutes is correct.

Ritchie, Q. C., in reply.—The argument that the 6th and 7th sections refer only to individuals and matters in the previous sections, is clearly untenable, because there are no indictments in the country.

There is nothing in the contention as to hostile vote. The vote is simply to make a case, and if the town is not satisfied with the statement of the case, it can apply to have it amended.

The 52nd section of the R. S., (passed subsequently to the Incorporation Act,) obliges the Clerk of the Peace to add to the assessment a sum sufficient to yield an amount equal to thirty cents for every inhabitant of the county for school purposes, and there is no exemption from that except of the city of Halifax. The exemption Dartmouth claims is by an act of 1873.

MCDONALD, J.—Does not the law provide a mode of enforcing payment where a section refuses to collect it? Is that by making a case? Can the Sessions make a case and ask for an opinion on matters that are not judicially before them?

Ritchie, Q. C.—They have a right to get an opinion on the broad question, whether the town can divide the rate and refuse to pay over a portion of it. There is no division of the county rate made by the statute. They are to assess the whole rate and send it in to the county.

The 36th section solely refers to the local rates. That makes it consistent with the general legislation. The county school rate is not a school rate. It goes into the general lump with the other rates. If the section, is to be carried out to its full literal extent, the public school act does not apply to them at all.—(YOUNG, C. J.—Must not all these clauses be read in the light of the general educational law of the country?) We admit that the town has the appropriation, under the act of 1873, of the moneys raised in the town for schools; then subsequent to that in 1876, it is provided that in addition to those local rates, the town shall be assessed a certain amount for county schools.

SIR WILLIAM YOUNG, C. J., now, (February 5th, 1878,) delivered the judgment of the Court:—

A dispute having arisen between the Sessions of the County of Halifax and the incorporated town of Dartmouth, as to their liability for a portion of the County Assessment, a case was stated by the Sessions for the opinion of the Supreme Court under the R. S., ch. 20, sec. 7, which was argued before us in the present term.

It turns upon the true construction of the act of incorporation, ch. 17 of the Acts of 1873, and our attention having been turned last term to the acts for incorporating the towns of New Glasgow, Pictou and Truro, and the anomalous powers conferred thereby, we cannot but remark on the entire looseness with which these three acts are drawn, all of them differing from each other, and raising many questions which a more cautious and prudent legislation would avoid. We cannot anticipate what pretentions New Glasgow, Pictou, and Truro may advance, the former having already exercised a power of taxation limited only by its own discretion; but sure we are that they cannot aim at a higher authority than the learned Recorder and Counsel of Dartmouth gravely urged before us, that under the 27th and 28th sections of the Act of 1873, the Warden and Council of that municipal body had absolute control, within its limits,—an unrestrained jurisdiction, over the poor, the schools, the sale of intoxicating liquors, the regulating and collecting of assessments. So much, it is said, for the 27th section. Then, under the

28th section, they had the right to vote, assess, collect, receive, appropriate and pay whatever moneys were required for county assessments, schools and other rates, &c. The very extravagance of these pretensions, which, as we shall presently see, are inconsistent with each other, is their best answer. We cannot attribute to the Legislature an intention to abrogate their own functions in favor of a municipal body at Dartmouth,—to have conflicting laws on the opposite sides of our harbour, and erect an *imperium in imperio* within hail of the Province Building.

We are dealing with a private act, extending only to a small body of the people within a narrow space, seeking the regulation and control of their local affairs, and I have no doubt managing them wisely, especially, as it was said, in the matter of education, but demanding an exemption from a common burthen imposed by the common school act, ch. 32, sec. 52.

This is a conflict between the two acts. Now, what is the rule of interpretation as it is laid down in *Maxwell's* Treatise, fol. 268–270. "Such acts," he says, citing numerous cases, "are to be construed more strictly perhaps than any other kind of enactment." The courts take notice that they are obtained on the petitions framed by their promoters," (and in this very case it was admitted at the argument that the act originally sought went much further than the act that passed,) "and that they are in effect contracts between those persons and the Legislature, or the public. Their language, therefore, is treated as the language of their promoters, who asked the Legislature to confer exceptional powers on them, and when doubt arises as to the construction of that language, the maxim ordinarily applied to the construction of statutes that *verba cartarum fortius accipiuntur contra proferentem*, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants, and against those who claim to exercise them."

By sec, 52, ch. 32, all over the Province, except as hereinafter provided in relation to the city of Halifax, the Clerk of the Peace in each County is directed to add to the sum annually voted for general County purposes at the general session,

a sum sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every inhabitant of the county, according to the last census preceding the issue of the county rate roll. The sum so added forms a portion of the county rates, and one-half the sum so raised is to be paid semi-annually by the County Treasurer, upon the order of the board or boards of school commissioners for the county.

In May, 1876, the Clerk of the Peace for the County of Halifax, added to the sum voted for county purposes for that year, the sum of $8,847, for the special purpose contemplated in the above section 52.

The return of assessable property in May, 1876, being $1,223,455, the Clerk of the Peace, under chapter 24 of the Acts of 1862, apportioned the amount required to be assessed for county purposes among the different districts, the amount assessable on property in the municipality of Dartmouth being $4,510, which the sessions approved of, and the Town Council refused to assess or collect. We suggested that as the whole of this sum was not disputed, the proportions should be stated, and they stand thus: Of the $4,510, $1,535 were for county purposes, which the Town Council acquiesced in and have paid. The balance of $2,975 in 1876 represents the municipality's share of the assessment of thirty cents a head, under sec. 52, ch. 32.

Now, if the Town Council were exclusively entitled under section 28 of their act to vote, assess, appropriate and pay all moneys required for county assessments, as well as for poor, school and other rates, they had as clear a right to resist the payment of the $1,535, as of the $2,975. But I am of opinion that they were equally bound by law to assess and collect both sums, and to pay the same over to the County Treasurer, to be distributed under sections 52 and 53, Dartmouth, of course, receiving its proportion of the whole.

A preliminary objection was taken to the case prepared by the sessions, not as having mis-stated the facts, but as *ex parte*, and unauthorized by section 6, chapter 20, which as it was urged, was meant only to apply to criminal cases. This section has stood in all the revisions since 1851, and is in general terms. There is some plausibility in the objection, but as our opinion on the case can be enforced only by other

proceedings, we thought it better to state it for the guidance of both parties, and in the hope of preventing litigation.

If the Legislature think it equitable to relieve Dartmouth from the payment of thirty cents a head for school purposes, let them grant the exemption, which should extend also to the towns of Pictou and Truro, by an express enactment. The acts incorporating these towns contain the same clauses as sections 27 and 28 of the Dartmouth act, and must be subject to the same construction.

McDONALD and SMITH, J J., questioned the authority of the sessions to send up the case.

McLEOD ET AL. *v.* CITIZENS' INSURANCE COMPANY.

PLAINTIFF obtained a policy of insurance from the Defendants, containing a condition that if the interest of the assured was other than the entire unconditional and sole ownership, it must be so expressed in the written part of the policy, otherwise the policy to be void. There was a mortgage to secure the sum of $800 on a portion of the insured property, no mention of which was made in the policy, but the policy had been effected on the verbal application of one of the plaintiffs, who testified that he had told defendant's agent that there was a mortgage of $500 on the property, (referring apparently to another mortgage, an assignment of which was held by two of the plaintiffs, the equity of redemption being in the plaintiff McLeod and another who was not a plaintiff.) The building was valued in the claim at $3000, and four of plaintiffs' witnesses testified that it was worth that amount, a fifth, that it was worth only $500, while the ten witnesses for defendants valued it at sums ranging from $300 to $600. The verdict was for plaintiffs for the whole amount of their claim, not allowing $149 for the proceeds of property saved.

Held, that as there was undisputed evidence of an incumbrance not mentioned in the policy, and no evidence of fraudulent omission on the part of the Company, and further, as the claim had been wilfully exaggerated, and the verdict was excessive in that no allowance had been made for salvage, it must be set aside.

ACTION on a policy of fire insurance on a mill and machinery, tried at Lunenburg in October, 1877, before Mr. Justice McDONALD. A verdict was found for plaintiffs for the full amount claimed, and a rule *nisi* granted to set it aside, on the following grounds; that the verdict was "contrary to law and evidence," that it "was given contrary to the charge of the Judge who tried the cause," and on grounds and objections taken on the trial, some of which were reserved by the Judge who tried the cause. The principal grounds of defence pleaded by the defendant Company were non-disclosure of interest and incumbrance on the premises in the application for insurance, over-valuation and over-claim on the part of plaintiffs. The rule was argued January 4th, 1878, before YOUNG, C. J., and DESBARRES, SMITH, and JAMES, J J.

Oxley, in support of rule.—There was not here a sufficient disclosure of the real ownership of the property, as required by condition No. 2 in the policy. The interest of Starratt, as co-grantee under deed from Rissey, was not disclosed. A bill of sale covering part of the property insured was not disclosed; see *Wilbur* v. *Bowditch*, 10 Cushing's Mass. Rep., 466, *Bates' Dig. Ins. Cases*, 248; *Sansum's Ins. Dig.*, p. 668, sec. 14, p. 236, sec. 3; *20 U. C. C. P.*, 447; *Clarke's Law of Ins.*, 126, 128; *8 Cushing*, 127; *Bates' Dig.*, 252; *Sansum's Dig.*, p. 112, sec. 10. There is clear evidence of an over-valuation of the building; *19 U. C. Q. B.*, 110; *18 Id.*, 248.

J. W. Johnson, contra.—The verdict of the jury settles the question of over-valuation. But, admitting that the finding of a jury is not always conclusive, there is evidence here to sustain this verdict, several witnesses, one of the plaintiffs, two mill-wrights, and others, giving the value of the property as about the valuation given at the time of insuring, and at the time of loss. The evidence of defendants' witnesses shews great discrepancies, their valuations varying more than fifty per cent. Defendants' witnesses are farmers and laboring men, and yet they give opinions upon the value of this mill and its machinery, and the Court is asked to set the verdict of the jury aside, because these outnumbered plaintiffs' witnesses. A most important fact is that one of the plaintiffs testifies that when he was effecting the insurance the Agent of the Company went with him and viewed the premises. The burden of proof of interest in the property undisclosed rests on the defendant Company, as concealment of it would involve fraud; *13 M. & W.*, 606; *3 Exch.*, 542.

The COURT.—The non-disclosure of that interest does not involve fraud; it is a question of non-compliance with a condition of the policy.

Johnson.—In the case in *13 M. & W.*, the fact undisclosed was that the vessel insured had sailed from a certain port some time before the insurance was effected. See also *Taylor on Evidence*, p. 335, sec. 339; *7 L. & E., Rep.*, 578; *Bliss on Life Insurance*, 618.

The disclosure of the mortgage here was a disclosure of Starratt's interest, as he appears in it as one of the mort-

gagors. The ownership of the insurers was entire within the meaning of the second condition; the sole legal title was in them as assignees of the mortgage; the entire equitable title was in them, as appears by the testimony of one of the witnesses, that at the time insurance was effected Starratt had no just claim upon the property; it had been partnership property, and Starratt had left the partnership before the insurance. Starratt's interest, if he had any, was similar to a vendor's lien, which is not an incumbrance within the meaning of insurers; *Bates' Dig.*, p. 263, sec. 56; *Id.*, p. 642, sec. 43, p. 694, sec. 9; *Sansum's Dig.*, p. 673, sec. 5; p. 675, sec. 5; *7 U. C. C. P.*, p. 548. The bill of sale was not executed; it was signed by only one party in the partnership name. There is hardly any evidence of identification of any of the insured machinery as covered by the bill of sale.

McDonald, Q. C., follows.—There is no plea of misrepresentation at the time of effecting the insurance. There is nothing upon which this ground can be taken but a bare plea of fraud, which does not show the particulars of the defence, as required by our Practice Act. In the case cited on the other side from *18 U. C., Q. B.*, 246, the plea alleging fraud set out the misrepresentation. The policy contains nineteen conditions, under any one of which a fraud might be charged. There is a plea alleging fraudulent misrepresentation after the loss, but there is no evidence of anything of the kind. It is to be assumed that the issue was put to the jury whether there was any wilful or fraudulent misrepresentation. In reference to the machinery there is no contention of overcharge; in reference to the value of the building, the mind of the assured was the same at the time of the loss as at the time of insuring. The Company was represented at the time of effecting the insurance by their agent, who went on the premises when the plaintiffs represented the value of them.

This case is not one where the Court should review the verdict of the jury, as the Judge has not expressed himself dissatisfied with that verdict.

As to salvage, it amounted to only $149, while there was over $1,500 worth of machinery subjected to loss, and the insurance on machinery was $1,200.

The paper called a bill of sale is not a mortgage; it purports to be under seal, but has only the signature "Starratt & McLeod," by whom written it does not appear. There is no proof of delivery of the property named in the paper. One partner could not execute for the firm; *Lindley on Partnership*, 291. A partner is able to insure in his own name the whole personal property of a firm within the meaning of the second condition of the policy, because he has an absolute control over it, can sell or dispose of it. With regard to the real estate, McLeod, one of the insurers, held the equity of redemption, representing himself and his former partner, Starratt, and the other two insured held the legal title, as assignees of the mortgage. As to value, see *Bates*, p. 37, sec. 21; p. 39, sec. 28; p. 44, sec. 45; p. 49, sec. 65; p. 177, sec. 26.

Henry, in reply.—There is a strong preponderance of evidence to shew that the building was very largely over-valued in the claim filed after loss. The evidence of defendants' witnesses is clear and not inconsistent. The over-claim is a fraud under the policy.

In regard to interest, it may be said that unless we shew that an interest was not disclosed, the fact of its not appearing in the policy cannot be taken advantage of by the Company. But there is evidence to shew that the existence of the paper called a bill of sale was not communicated. In *Lochner* v. *Home Mutual Insurance Company*, Bennett's Dig., 445, it was held, where the written application was made a part of the policy and did not mention the incumbrance, that the plaintiff could not give parol evidence of having communicated the incumbrance to the agent who filled in the application. It is contended that the bill of sale here is invalid, but it certainly bound the man who executed it, and therefore conveyed a moiety of interest. There can be no question that Starratt had an outstanding equitable interest, an equity of redemption, which could not be sworn away by a witness stating that he had no just claim. *Bates' Dig.*, 642, sec. 43; *Cann* v. *Imp. Fire Ins. Co'y*, 1 Russell & Chesley, 240; *7 Bingh.*, 349; *1 Foster & Finlason*, 276; *3 Bennett's Dig.*, 514; *1 Bennett*, 481; *2 Bennett*, 427.

JAMES, J., now, (February 5th, 1878,) delivered the judgment of the Court:—

This was an action tried before McDONALD, J., in October term, 1877, at Lunenburg. Verdict for plaintiff for the whole amount of policy, viz: $3000, without deducting a sum of $149, proved to have been received by the plaintiff as salvage.

The policy was in favor of plaintiffs for $3000, viz: "On a three story frame and shingle roofed building situate and being on the west side of Main Road, Bridgewater, Lunenburg County, occupied as a shingle mill, two thousand dollars; on machinery therein, one thousand dollars." There was no other writing in the policy except the necessary names, dates and signatures.

The body of the policy contained the following clause: "And that this policy is made under the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and the obligations of the parties hereto in all cases not herein other wise specially provided for." And on the policy was endorsed *inter alia* the following printed condition No. 2: "If the interest of the assured in the property be other than the *entire unconditional and sole ownership of the property for the use and benefit of the assured*, or if the building insured stands on leased ground, it must be so represented to the Company, and *expressed in the written part of this policy, otherwise the policy shall be void.*"

On the back of the policy, in larger type, is the following notice to the assured: "N. B.—For your own protection you are requested to read this policy, and, if incorrect, to return it for alteration, &c."

There is no evidence that any application was made to the Company for an alteration in the policy.

There was also on the back of the policy the following printed condition: "No. 11. If in any claim for loss or damage, or in the affidavit or affirmation made in support thereof, the assured is guilty of any wilful mis-statement with intent to deceive the Company as to the nature of the risk, or as to the amount of the loss, or if there be any fraudulent overcharges in the claim made, this policy shall cease to have any effect, and be void, and the insured shall forfeit all remedies and rights of action thereon."

A printed and written application to the defendants for a policy in favor of the plaintiffs on the same property, signed by the Company's agent at Bridgewater, made in October, 1876, was given in evidence, but no insurance was effected on that application, and there is no evidence to connect it with the subsequent insurance, which was effected on the 4th March, 1877, upon the verbal application of the plaintiff Greenwood to Mr. Friend, the defendants' local agent at Bridgewater. The property was destroyed by fire on the 26th day of May following. The plaintiffs, after the fire, in their preliminary proof, represented the value of the property, including the site and mill dam, which, with the building, had been purchased for $800, at $4514.58, and claimed the whole amount insured, namely, on building $2000 and machinery $1000. At the argument the defendants abandoned any contestation as to the value of the machinery, and also as to any over valuation in the application for insurance, there being no plea to sustain such objections, and confined their objections to two points, first that the 2nd condition, requiring a statement by the assured of his interest was violated; and secondly, that the assured was guilty of wilful and material mis-statement in making his claim on the Company.

It was contended for the plaintiff on the first ground of objection that there was at the time of the application and making of the policy, no outstanding interest, legal or equitable, in any third party, such as would vitiate the policy under the second condition. The evidence on this point went to shew that one of the plaintiffs, McLeod, and one George Starratt, being joint-owners in fee simple of the mill insured, and the mill site, mortgaged the same in January, 1875, for $500, to one Francis Rissie, from whom, at the same date, they had received a conveyance of the property, and that in the following May Rissie, in consideration of $408, assigned the mortgage and the original debt of $500 to the two other plaintiffs McPherson and Greenwood; so that at the time of the insurance McPherson and Greenwood were the holders of the legal title, and McLeod and Starratt the owners of the Equity of redemption. From the time of the purchase until May, a period of some four months, the plaintiff McLeod and Starratt occupied and used the premises as a mill. Starratt then

absconded and the plaintiffs entered into partnership, put additional machinery into the building, and occupied it until it was burned in May, 1877. No conveyance of Starratt's equity of redemption was proved, nor any evidence of its having been purchased from him, or any payment made to him as the value. The plaintiff McLeod says, it is true, that "Starratt had no just claims on the building at the time of the insurance. Starratt ran away from the country. * * * We paid over $1600 on his account after he left." This evidence may be sufficient to show that Starratt had received compensation for his interest in the premises, which, so far as appears by the documents, amounted to about $150, but he was, when the insurance was effected, the owner of an equitable interest in the premises, the value of which is uncertain.

It also appeared in evidence that Starratt and McLeod, on the 29th of April, 1875, before the two other plaintiffs became interested, executed to John Levi Oxner and Peter Fraser a bill of sale of machinery and other personal property on the premises which, or a part of which, formed a portion of the personal property insured, as a security for the sum of $800, and this mortgage was outstanding at the time of the insurance.

Some discussion took place at the argument as to the nature of the interest requiring to be disclosed to the insurers under this policy, but I need not, in the view I take of the case, do more than indicate, as the result of the authorities which I have examined, that the outstanding interest respecting which the insurers would naturally require information must be a substantial interest,—something of value which diminished the interest in the building which the owners might justly and honestly insure for their own benefit. And, whatever opinion I might be compelled to adopt on a very nice examination of decided cases, in respect to the somewhat shadowy and uncertain claim outstanding in Starratt, I can have no doubt that the law is well and conclusively settled by numerous cases that a substantial mortgage interest, such as that existing in Oxner and Fraser, was one which ought to have been, if it had not been, communicated to the Company, and mentioned in the policy.

But, it was given in evidence at the trial, that the defendant Company had an agent at Bridgewater, that the appli-

cation was made to him verbally, and by him to the Company. Greenwood says; "I told Friend, the agent, at the time of the application, that there was a mortgage for $500 on the property. I don't remember the particulars."

This is all the evidence we have of any notice, direct or indirect, to the defendants of this mortgage.

A number of American cases were cited in the argument to shew that notice of this kind given to the agent was sufficient to bind the Company, and several cases were also cited to the contrary, including the case of *Johnston* v. *Magara District Mutual Ins. Co.*, U. C., Q. B., 430, (1866).

But there is a peculiarity in this policy requiring the outstanding interests not only to be communicated to the Company, but inserted in the written portion of the policy. In this respect this policy differs from nearly all of the policies mentioned in the reported cases which I have seen so far as they turn on this point. This condition has obviously been adopted by the insurers to meet the very class of cases in which the conditions of the policy have been evaded by giving evidence of verbal statements to the agent. The reception of evidence of such statements in several cases is perhaps to be regretted as leading to greater wrong and injustice than the evils such decisions were intended to prevent. They have opened a fruitful source of perjury and fraud, both on the part of the insured and of the agents of the insurers. These agents are scattered everywhere over the country, rival offices being thus represented in almost every village and hamlet in the land, and there is not only a keen competition among them to advance the interests of their employers, but, unfortunately, they have a strong personal interest in effecting as many insurances as possible, because they are paid by commissions and often large and extravagant commissions, on the amount of the premiums which they receive. They are thus under a very strong temptation to conceal facts brought to their knowledge by the assured which might prevent the acceptance of risks. It was, doubtless, to check these frauds, whether originated by the assured or the agent or by the two colluding together, that this stringent, but probable wholesome condition, was inserted in this policy. Whether it is too stringent,

it is not for us to decide, as it is undoubtedly a part of the contract between the parties; but I may remark that the assured have but little right to complain if they suffer by it, as they are specially requested by a prominent notice on the back of the policy to read it, and, if not satisfactory, to return it for alteration.

I have found but one case, *Bates' Digest*, p. 258, sec. 35, *Gahagan* v. *Union Mutual Ins. Co.* 43 N. H., 176, 1861, which appears to have been founded on a policy such as the present. I am sorry that the report is not accessible, as the Digest is brief and not very clear. In that case, by the terms of the policy, it was to be void, "unless the true title of the assured and the incumbrances on the same were explained therein,"—a clause substantially identical with that under consideration; and it was held that the existence of an encumbrance is a fact material as a matter of law to be disclosed, and if not set forth in the policy it will be void, unless it be shewn that the incumbrance was known to the insurer, and not fraudulently concealed. The cases in which notice to the agent was held sufficient, were to the effect that the insurers should be affected by such notice, unless they could show fraud or negligence on the part of the assured. The case I have noted recognizes the validity of the condition, and seems to hold its effect to be to throw the burthen of proving fraud, in case of the omission of the statement required by the policy, on the assured, at least such, in my opinion, is the effect of the condition. I feel bound, therefore, there being clear and undisputed evidence of an outstanding incumbrance of $500 not mentioned in the written part of the policy, and there being no evidence of fraudulent omission on the part of the Company, to hold that the verdict in this case ought to be set aside.

I do not feel bound to go at great length into the other question, but I ought to give the party entitled to it the benefit of my opinion. I have no doubt, from a careful examination of the evidence, not only that there was an over-valuation of the real estate in making the claim but that that over-valuation was so great as not to justify the jury in finding a verdict for the plaintiff. It seems to me impossible to read the evidence without coming to the conclusion that the

plaintiffs, in their claim, were guilty of "wilful mis-statement," with intent to deceive the Company as to the amount of the loss.

It is true four witnesses on behalf of the plaintiffs put the value of the building at $2,000 or over, but two of them were interested, and their evidence is not satisfactory in several respects. One of the plaintiffs' witnesses, doubtless somewhat incautiously placed on the stand, valued it at $500. All the defendants' witnesses, ten in number, most of them persons who had excellent opportunities of judging, have placed the value at from $300 to $500. The tendency of witnesses in such cases is not to purposely undervalue their neighbors' property. If they have in this case valued property at $400 or $500 which was worth $2000, they must have done so in pursuance of a foul conspiracy to wrong the plaintiffs by perjury. On the other hand, if the building consumed was not worth more than $500, which in my opinion is the result of the evidence, it seems to me impossible that they could in good faith have made a claim on the Company for four times that amount. If they have wilfully made an excessive claim, they have, by the terms of the 11th condition, forfeited all their claims, under the express terms of the policy, both for the real and personal property. The amount claimed is too excessive in my opinion, to leave any doubt that the claim was not made in good faith.

The principle which must govern this branch of the case was fully recognized by the unanimous decision of the Court of Common Pleas in *Levy* v. *Baillie et al.*, 7 Bing., 349; 5 M. & P., 208. In that case a plaintiff effected a policy against fire, with a condition that he should forfeit all benefit under the policy if there was any fraud or false swearing in the claim he made. A fire ensued, and the plaintiff made affidavit of the damage to the extent of £1085. Having sued for the amount and a jury having found a verdict for him with only £500 damages, the Court granted a new trial, the ground of the decision being that the plaintiffs having claimed more than double the amount of damage found by the jury, the claim must have been fraudulently exaggerated. In this case the discrepancy between the value proved and the amount claimed is still greater.

On these grounds, and also on the ground that the verdict is excessive, the jury not having given the defendant credit for $149, being the net proceeds of property saved from the fire, I am of opinion that the rule for a new trial should be made absolute, and, if the conclusions at which I have arrived are accurate, no benefit can accrue to the plaintiffs from a second trial.

Rule absolute, with costs.

FREEMAN *v.* MORAN.

APPEAL from County Court dismissed on the ground that papers were not certified.

IN this cause and another, in which an appeal was taken from the decision of the County Court, *Meagher*, on one of the motion days, moved to dismiss the appeals, as the papers were not certified as required by sections 29 and 30 of cap. 6, Acts of 1877; citing also *R. S.*, c. 94, s. 218. The papers were afterwards, under an order obtained by *Rigby, Q. C.*, taken off the file and sent back to the county to be certified. The motion to dismiss the appeal was afterwards renewed by *Meagher*, on the grounds just stated.

Rigby, Q. C., contra.—The appeal is completed without the certification of the papers. The statute says, "when the appeal is completed the papers shall be certified." They were partly certified. They were taken off the file by order afterwards and certified. It is only necessary for me to have papers that I consider essential to the argument certified. I I don't admit that as to one cause the papers are not all certified. In the other, I say that all that are necessary are certified. I admit that they were not certified when the papers were sent.

Meagher, cites sec. 39, "the Judge shall certify." The certificate is an absolutely essential element.

The COURT, *per* SIR WILLIAM YOUNG, C. J., (February 9th, 1878,) pronounced judgment, dismissing the appeals.

MAILMAN *v.* OVERSEERS OF POOR.

APPEAL from County Court dismissed, the rule for appeal not having been served.

Rigby, Q. C., on one of the motion days this term moved to strike this cause, which was an appeal from the County Court, off the docket, on the ground that the rule for appeal had not been served.

Meagher, contra.—This cause was tried, and appeal taken under the old County Court Act. It is not necessary that grounds of appeal should be given under that act. The Judge had no power to deliver a judgment at Chambers after the term was over, as in this case; County Court Act of 1874, sec. 53. No service of any rule was required. The rule was granted. In *Dickie* v. *Grant*, no proof of service of rule was required. *(Rigby, Q. C.*—There was no evidence there, as here, that the rule was not served). Practice Act, sec. 215. The entry is notice under that section to the party, especially as in this case it is not a rule containing grounds which it is important to the party to know. The first rule is a mere rule for a stay of proceedings, an appeal having been granted. The judgment is irregular, having been delivered out of term by the Judge.

Rigby, Q. C.—The objection that the judgment was not delivered in term cannot prevail. The Judges of the County Court could do the same as the Judges of the Supreme Court always have done. The Court is asked to hold that a party may take out a rule for an appeal and lock it up in his desk and keep it there.

The COURT, *per* SIR WILLIAM YOUNG, C. J., (on February 9th, 1878,) delivered judgment, dismissing the appeal.

LAWSON *v.* THE CITY OF HALIFAX.

PLAINTIFF'S first count set out that he was possessed of a messuage known as Emerald Hall, which he had been accustomed to let for hire to soldiers of the garrison, to be used as a dance hall, and that defendants, well knowing the premises, and contriving to injure plaintiff, unlawfully and unjustly persuaded, procured and induced the General commanding the forces, by an order to prevent the soldiers from assembling in said Hall. The second count differed only in alleging that the Hall was occupied in a legitimate, orderly and proper manner, and that defendant, knowing and contriving, as before, wrongfully and falsely represented to the General that it was a nuisance, by means of which false representations the General was induced to prohibit the use of said Hall by the soldiers. Defendant pleaded that plaintiff at the time mentioned occupied said premises, and, contrary to law, kept a disorderly house, frequented by soldiers and citizens, who, by their riotous and disorderly conduct, disturbed the peace of the citizens, and that the General, in consequence of the disorderly house so kept by the plaintiff, placed the said Hall out of bounds for the military, &c.

Held, on demurrer, that the plea was bad, as it neither traversed nor confessed and avoided plaintiff's allegation, the gist of which was that the city, contriving to injure the plaintiff, wrongfully, unlawfully and falsely represented, &c., but that the declaration did not disclose a good cause of action, as although the city could be held liable for intentional acts of misfeasance, it did not appear that there was any binding agreement conferring rights or interests upon the plaintiff which had been violated by the procurement of the defendant.

This was an action brought against the city for inducing the General to place "Emerald Hall," a house possessed by plaintiff, "out of bounds," in consequence of which the soldiers of the garrison were prevented from using the same for a dance hall as they had theretofore done. The fourth plea set out in substance that the house had been kept in a disorderly and riotous manner, to the disturbance of the peace and quiet of the citizens in the neighborhood, and that the General had, in consequence of the disorderly house so kept by plaintiff, placed the Hall out of bounds, which was the grievance complained of. The cause came before the Court on a demurrer to this plea, the grounds of which as well as the pleadings themselves are fully set out in the judgment of the Court.

Ritchie, Q. C., for demurrer.—A plea which professes to go to the whole declaration must either traverse the matter alleged or confess and avoid it. This does neither. The gist of the action is that the city by false representations induced the General to place the house out of bounds. The plea says it was a disorderly house, &c. It does not traverse the material fact that the city induced the General to put it out of bounds, and did so falsely. If the plea had confessed the inducing, but justified, it would be good. We don't complain that the General put the house out of bounds, which he had a perfect right to do if he chose, but that the city induced it.

McDonald, Q. C., contra.—The declaration is itself insufficient, and it comes before the Court on the demurrer. *Stephen on Pleading*, 144.

This is a special demurrer, as it is to the form of the plea only, and will not lie under our statute. *Morrison* v. *Kandick*, 2 R. & C., 148. The gist of the action is that that the city for some reason, (plaintiff says falsely,) induced the General to exercise the authority that he is admitted to possess. The plea is that the Hall was a nuisance, and that the General prevented the soldiers from going there. They say, "that is a perfect answer, only that you do not say it is by our representation." Sec. 124 of the R. S., c. 94, enacts that duplicity, uncertainty, &c., shall be no objection to a pleading.

The first count in the declaration is bad. The city cannot in its corporate capacity make any false representation, and it is not alleged that they did, but that they unlawfully and unjustly induced the General to place the house out of bounds. The city could not persuade. A resolution might be evidence of a representation, but the city cannot procure, induce, or persuade.

The second count sets out that it was represented to be a nuisance. The plea alleges that it was a nuisance.

The plea meets in substance the allegation of false representation, if not directly, argumentatively. *Strong* v. *B. B. N. A.*, 1 P. C., Ap., 307. Plaintiff says that the defendant falsely represented it to be a nuisance. The plea says it *was* in fact a nuisance. That is argumentatively a denial of the falsehood of the representation. The plea also impliedly denies the inducement by the representations, as it sets out that the General did it of his own motion.

Weatherbe, Q. C., in reply.—This cause has been spoken of as an unusual one, but, theoretically at least, no case should ever be brought precisely similar to any case that has been previously decided. In *Winsmore* v. *Greenbank*, Willes, 577, the doctrine as to actions on the case is clearly laid down, that new facts must be laid for each action on the case, that the action originated because of the principle that no wrong should go without a remedy. The judgment in that case goes a long way to support the whole declaration in this case.

The declaration here alleges the house in question to have been kept in an orderly manner; if it was not, it was the duty of the city to stop the disorder; therefore the city had no right to make representations at all to the General. The only points to be tried here are, whether there was any representation made, and the amount of damages. One of the pleas here is treated on the other side as a plea of justification, but it is no answer here to say that the house was disorderly. See the City Charter, sec. 227. The fourth plea is no answer at all; it neither admits nor denies the facts alleged in the declaration, but simply states that the plaintiff kept a disorderly house, (*non constat*, what house,) and that the General interdicted it.

It was contended on the other side that you could not sue a corporation for a false representation; but the law on that point is clearly settled the other way; see *Fisher's Dig.*, 2003 –4. A corporation may be sued for libel, for acts of misfeasance done by its servants, even without direct authority, if they are within the general scope of their authority. It is not clear that we would be obliged here to connect the city directly with the misrepresentations in this case. *Stephen on Pleading*, 138 and 201. Is this plea a confession and avoidance, or is it a denial? If neither, it is bad. The pleas given by *Stephen* as bad on this ground come much nearer the mark than this. Cites *5 Mass. Rep.*, 438; *7 C. B., N. S.*, 290.

SMITH, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This is an action brought by the plaintiff against the city of Halifax, upon a very peculiar, and somewhat novel statement of facts. There are two counts in the declaration for the same cause of action, to some extent, although not materially, varying the gravamen. The defendant pleaded several pleas, to the fourth of which the plaintiff demurred.

Before proceeding to state the grounds of the demurrer, it will be necessary to ascertain the character of the action to which the plea objected to purports to be an answer.

The first count alleges substantially that "the plaintiff, in the month of September, 1876, was possessed of and occupied a messuage and premises, in the city of Halifax, known as

Emerald Hall, which he had in said month of September, and for a long time previous, let for hire and gain to soldiers of the garrison, to be used by them as a dance-hall, and that it was so used, whereby the plaintiff was in the habit of receiving, and did receive a large sum weekly and monthly from said hiring, and would have continued to receive it during said month and from thence hitherto, yet, that the defendant, well knowing the premises, and contriving to injure the plaintiff, and prevent him from receiving the said money in the said month of September, unlawfully and unjustly persuaded, procured and induced His Excellency, the General commanding the Forces in Nova Scotia, by an order to prevent the said soldiers from assembling in said Hall, in consequence of which the soldiers ceased to assemble in the same, whereby the plaintiff lost the aforesaid profits and rental, and was put to expense in seeking unsuccessfully to restore said Hall to within military bounds."

The second count is essentially the same as the first, except that it alleges that the Hall was occupied by the soldiers in "a legitimate, orderly and proper manner;" and that the defendant, knowing this fact, but contriving to injure the plaintiff and deprive him of his profits, wrongfully, unlawfully and falsely represented to the General that the said Hall was a nuisance, and that great evils resulted from the use of said Hall, by means of which false representations the General was induced to prohibit the use of said Hall by the soldiers."

The plea demurred to is as follows:—

"That the plaintiff, at the time mentioned in the declaration, occupied the premises known as Emerald Hall named in his declaration, and, contrary to the law, kept a disorderly house, frequented by soldiers of the Garrison and civilians, who by their riotous, disorderly and improper conduct and behaviour, disturbed the peace and quiet of the citizens in the neighbourhood of the said Emerald Hall, and that His Excellency the General commanding the Forces, in consequence of the disorderly house so kept by the plaintiff, placed the said Emerald Hall out of bounds for the military, and forbade and interdicted soldiers of the Garrison from assembling in or frequenting said Hall, and which constitutes the grievance complained of."

The plaintiff, in his demurrer to this plea, says it is bad in substance for the following reasons:—

First; Because the said plea does not contain a sufficient ground of defence to the declaration, nor is it an answer to the declaration, but attempts to evade the same.

Secondly; Because the said plea does not deny the facts alleged in the declaration, nor does it confess and avoid them.

Thirdly, Because the said plea does not put in issue any matter of fact alleged in the declaration, but the said plea introduces and attempts to put in issue matters of fact not alleged and not necessary to be alleged, and introduces parties and matter foreign to the issue.

Fourthly, That the said plea attempts to justify but does not admit the grievance.

The defendant joined in demurrer.

I think the plea cannot be sustained, and is substantially bad on the two first grounds of demurrer. However much the practice of our Courts has been simplified, and technical defects in pleading obviated by legislative enactments, it is yet of the utmost importance that all the pleadings on the record should be controlled by some principle of reasoning that will compel both plaintiff and defendant to expand substantially their grounds of action and defence. There is evidently no answer to the plaintiff's declaration in this plea. The gist of the plaintiff's action is as set out in the second count, that the defendant, "*contriving to injure the plaintiff, and to prevent* the soldiers from using the Hall, *wrongfully, unlawfully* and *falsely* represented to the General that the said Hall was a nuisance, &c., by means of which false representations the said General prohibited the use of said Hall, resulting in the injury complained of." The plea does not put in issue this allegation, nor does it confess and avoid it. If there were no other plea on the record, an issue would be raised immaterial to that which it would be necessary to try as the ground of the plaintiff's action. See *Crossfield* v. *Morrison*, 7 C. B., 286. I am, therefore, of opinion that the plea is bad.

The more difficult and important question yet remains to be disposed of, namely, does the plaintiff's declaration disclose a

good cause of action? It was contended at the argument that such an action could not be maintained against a corporate body, but there are numerous cases to shew that a corporation aggregate can be held liable to an action for acts of intentional misfeasance. In *Green* v. *The London Omnibus Co.*, 7 C.B., N.S., ERLE, C. J., in delivering judgment, said; "The doctrine relied on by Mr. Giffard, that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial." On the main question, whether an action of this description can be maintained upon the facts as alleged in the declaration, I have not been without some difficulty. I have examined with much care the cases cited at the argument by the plaintiff's counsel, and more particularly that, (a leading one,) of *Lumley* v. *Gye*, 2 Ell. and Black. 216. There the plaintiff was lessee and manager of the Queen's Theatre for performing operas, and he had contracted with one Johanna Wagner to perform in the Theatre for a certain time, and the defendant had, as alleged in plaintiff's writ, "knowing the premises, and maliciously intending to injure the plaintiff as such lessee and manager, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform, and by means of which she did refuse, and did not perform." The third count stated, that by virtue of such contract Wagner had become the dramatic artiste of plaintiff, and the defendant well knowing, &c. There was a demurrer to the declaration. This case turned largely, by the decision of the Court, upon the question whether the contract was such as to bring the case within that class which it was contended by defendant's counsel, were exceptions to a general rule, and in which actions have been maintainable for procuring persons to quit the service in which they had been retained and employed.

The majority of the Court who gave judgment did not establish the general principle as urged by plaintiff's counsel, and I presume insisted upon in the case under our consideration, that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party. On the contrary, although expressing strong opinions and dicta in favor of such a position, they found it unnecessary to rest their judgment or

decide on it. WIGHTMAN, J., remarked; "It is not, however, necessary for the maintenance of the third count of the declaration, at least, to rely upon so general a principle." And, CROMPTON, J., in delivering his judgment, said; "Without, however, deciding any more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously* procures a party who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period to refuse to give such service *during the period for which she had so contracted*, whereby the plaintiff was injured." And ERLE, J., remarks; "The relation of employer and employed is constituted by the contract alone." COLERIDGE, J., in a most exhaustive judgment, differs not only with the decision of the Court on the grounds upon which it proceeded, but dissents from their dicta expressed in reference to to the general principle I have referred to. He lays it down, "that in respect of breach of contract, the general rule of law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that as between master and servant there is an admitted exception; that this exception dates from the statute of laborers, 23 Edward III., and is both on principle, and according to authority limited by it."

I can find no case, after a careful search, that goes to the extent of deciding that an action will lie against a stranger, for even maliciously procuring a party to any and every contract to refuse to perform it. Even if such authorities could be found, the Courts would certainly require, before holding a third party liable for procuring a violation of a contract that that contract should be clearly defined and set out. A *binding agreement conferring certain rights* or *interests* upon the plaintiff, which has been violated by procurement of the defendant must be shewn. There must exist, at least, an actionable wrong in the violation of the agreement relied on. How is this shewn by the declaration? The first count alone exhibits anything, as I apprehend, approaching to such a contract, but even in this there is a most vague and unsatisfactory statement of the contract under which the soldiers occupied

and used the Hall in question. It avers that, "in the month of September, and for a long time previous thereto, the plaintiff had let the house for hire and gain to soldiers of the garrison, to be used by them as a dance hall, and the said hall was occupied by them for said purpose, whereby the plaintiff was in the habit of receiving, and did receive, a large sum weekly and monthly for the hire of said building up to the said month of September, and would have continued to receive the same weekly and monthly during the said month, and from thence hitherto."

There is no allegation whatever of the nature of the hiring or of the term for which the engagement was to extend. It is utterly impossible to arrive at the period during which the soldiers were bound to keep said Hall, under any contract entered into between them and the plaintiff. For aught that appears from the declaration, they might, without violating any contract, have ceased at any time to have continued their use of the Hall, and it would seem, rather, that their not continuing to engage the building as they had been accustomed to do is the injury complained of by the plaintiff. Their legal obligation to do so is not made manifest.

The second count is still less satisfactory on this point. It is there stated "that contriving to injure the plaintiff, and to *prevent* the said non-commissioned officers and men, and their wives and families, from hiring and using said Hall, and thereby deprive the plaintiff of the hire, &c., and in consequence of th defendant's representations, the soldiers were, by an order from the General, *prevented from hiring* and using said hall, &c.

Admitting, therefore, the soundness of the general principle discussed in the case of *Lumley* v. *Gye*, already referred to, still I do not conceive the plaintiff has brought himself within its operation. There is no such contract set out in the plaintiff's declaration, in my view of the case, as would entitle him to recover; while at the same time I am far from conceding, in the absence of some decided authority on the point, that the dissenting views of COLERIDGE, J., in reference to the dicta of the distinguished Judges in the case I have alluded to, are at all inaccurate.

I am of opinion that the judgment must be for the defendants.

HERKINS *v.* PROVINCIAL INSURANCE COMPANY.

THE policy of insurance issued by defendants to plaintiff required, among other things, as a condition precedent to recovery under the policy, a certificate under the hand of a Magistrate or Notary Public most contiguous to the place of the fire. The fire took place at Sable River, a country district several miles in length and breadth, and the evidence for plaintiff was merely to the effect that the certifying Justice resided at Sable River.

Held that, even in the absence of countervailing testimony, as the plaintiff had notice by the pleadings and the motion for non-suit that proof of compliance with this condition would be required, the evidence was not sufficient to sustain the finding of the jury for plaintiff.*

THIS was an action on a policy of fire insurance on stock in a country store, tried before Mr. Justice MCDONALD, at Shelburne, in September, 1877. A verdict was found for plaintiff for the full amount claimed, and a rule *nisi* to set the verdict aside, and for a new trial, was granted.

The rule was argued January 14th, 1878, before DESBARRES, MCDONALD, SMITH and JAMES, J J.

McDonald, Q. C., in support of rule.—There was gross misrepresentation as to the value of the goods, and as to the kerosene oil, which turns out to have been sold on the premises. The goods were all valued according to plaintiff's own statement, at cost, while the greater portion of them had been in the shop for years, and were not worth anything like cost prices. The 2nd sub-section of the first condition of the policy expressly avoids the policy in case of anything occurring within the control of the assured to increase the risk; the sale of kerosene oil in the shop clearly comes within this condition.

No sufficient proof of loss was furnished. The policy requires immediate notice of the fact of the fire. The first evidence we have of notice to the Company of the fire was a letter to the manager on the 30th November, 1875, while the fire took place on the 5th. The enquiry by the Company's agent on the 11th of November, as to whether the building burned was insured does not prove notice to him from plaintiff. There is no replication of waiver. The non-compliance with that condition requiring notice of the loss to be given forthwith is sufficient to avoid the right to recover under the policy according to its terms.

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* Other points of the case were dealt with in the judgment delivered by JAMES, J., but the ground stated is the one on which the judgment of the Court is based.

JAMES, J.—May not the jury have inferred that notice was given forthwith, from the fact that the Company's agent wrote to plaintiff about the fire six days after its occurrence?

McDonald, Q. C.—That would be against the evidence. There is no sufficient proof of the amount of the loss. The policy was void for violation of section 16, which prohibits the storing and sale of camphene, burning oil, &c., also, for violation of the clause relating to the sale of hazardous goods on the premises. There was misrepresentation of the value of the goods in the proof of loss as well as in the application.

There is no evidence that the magistrate who gave the certificate as to loss was the magistrate residing nearest the locality of the fire, as required by the policy.

Ritchie, Q. C., contra.—The Company should have shewn that there was no notice of loss. The evidence of plaintiff is that he notified his own agent in Halifax after the fire, and that soon after, (six days after the fire,) he received a postal card from the Company's agent, asking whether the building, (in which plaintiff's insured goods were,) was insured.

There is full preliminary proof of loss, as the proof contains, under oath, as full a statement of the goods destroyed as could be expected, in view of the fact that the invoices, &c., were burnt; *2 Bennett's Fire Insurance Cases*, 775. The Company's agent tried to insist on copies of the invoices.

DESBARRES and MCDONALD, J J.—That would be absurd.

Ritchie, Q. C.—As to the 16th condition, the article complained of, kerosene, does not come within the description of goods composed of turpentine and alcohol.

As to the 2nd sub-section of the first condition, respecting hazardous occupations and uses of the premises, the condition only avoids the policy, by its terms, *so long as* the premises are used for the sale of hazardous articles; now, first, it is in proof that there was no kerosene on the premises at the time of the fire; secondly, the kerosene was only intended for lighting the shop, of which the Company had notice; thirdly, the insurance was on a stock of general merchandize, which gave plaintiff a right to sell oil. See *2 Bennett*, 758.

As to misrepresentation of value, that point was not taken on the motion for non-suit; and further, that point was found

by the jury in favor of plaintiff, no evidence being given on the other side. The goods were only valued at the invoice price, not including costs and charges.

The point as to the magistrate was not taken on the motion for non-suit. The certificate of the magistrate on its face shews that he resided near the locality of the fire. The condition does not mean that the *nearest* magistrate shall furnish the certificate, but merely a magistrate residing near; *2 Bennett*, 50.

McDonald, Q. C., in reply.—In the postal card referred to the Company's agent does not refer to the goods. The question of waiver cannot be raised here. The notice must be given by the party assured; *Clarke on Insurance*, 212, 213. The notice is a condition precedent to recovery. Cites *Clarke*, 219, 220 and 228; refers to the cases cited in the previous arguments of *O'Connor* v. *Confederation Ass. Co'y*, and *McLeod* v. *Citizens' Ins. Co'y*, *Ante*, pp., 119, 156.

JAMES, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This was an action on a policy of insurance issued by the defendant Company, tried at Shelburne in last October term. Verdict for plaintiff for $1,200, being the amount of the policy. The following clauses occur in the policy:—

"And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned building or adjoining or other premises within sixty feet of such building, shall, at the time of the making, or at any time after the making, and during the continuance of this insurance, be appropriated, applied or used, to or for the purposes of carrying on or exercising therein any trade, business or vocation, denominated hazardous, extra hazardous, or specially hazardous, or included in the memorandums annexed to this policy, or for the purpose of storing, keeping or vending therein, any of the articles, goods or merchandize, in the conditions hereof denominated hazardous, extra hazardous, or specially hazardous, unless herein otherwise specially provided for, or hereafter agreed to by this Company in writing, and added to or endorsed upon this policy, then, and from thence-

forth, *so long as the same shall be so appropriated, applied or used*, these presents shall cease and be of no force or effect.

"*Condition* 10.—All persons insured by this Company and sustaining loss or damage by fire, are *forthwith to give notice thereof* to the Company or its agent, and as *soon after as possible*, to deliver in a particular account of such loss or damage, signed with their own hand, and verified by their oath or affirmation. They shall also declare on oath whether any and what other insurance has been made on the same property, what was the whole value of the subject insured, what was their interest therein, in what general manner, (as to trade, manufacture, merchandize or otherwise,) the building insured, or containing the subject insured, and the several parts thereof were occupied at the time of the loss, and who were the occupants of such buildings, and when and how the fire originated, so far as they know or believe, and procure a certificate under the hand of a Magistrate or Notary Public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the assured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statement, and knows or verily believes that he, she or they really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein mentioned, and also, if required, shall produce their books of account and other proper vouchers, and shall also, if required, submit to an examination under oath by the agent or attorney of the Company, and answer all questions touching his, her or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and *until such proofs, declarations and certificates are produced, and examination had, the loss shall not be deemed payable.*

"*Condition* 16.—This Company will not be answerable for any loss or damage to buildings or the contents of buildings, in which is used or stored camphene, burning fluid, spirit gas, or any other article of which spirits of turpentine or alcohol forms a component part, unless the same be specially agreed upon and set forth in the policy."

On argument of the rule *nisi* to set aside the verdict during the present term, six objections to the verdict were urged, viz:—

1. No immediate notice of the fire under condition 10.
2. No sufficient proof of amount of loss under condition 10.
3. Policy void under condition 16, as the building contained hazardous goods.
4, 5. Misrepresentation of value of goods in claim and proof of loss.
6. No evidence that the certifying magistrate was the nearest.

Condition 10 requires that parties insured sustaining damage shall "forthwith give notice thereof to the Company." The fire took place on the night of the 3rd and 4th of November, 1875, and the proof is that the plaintiff gave notice of the loss to his agent, Charles Murdock, Halifax, through whom the insurance had been effected. On what precise day this was done does not appear, but on the 11th November, the defendants' agent at Halifax sent to the plaintiff the following message by postal card:—"Be kind enough to let me know whether the building that was burned the other day was insured, and where."

There is abundant proof of waiver of all such unsubstantial objections in the correspondence, but as there is no replication of waiver, it is satisfactory to me that I consider the evidence given sufficient to justify the jury in presuming that Mr. Murdock, (whom we all know to have died before the trial, although the fact was not put in evidence, and who could not therefore be produced as a witness,) gave timely notice of the fire to the defendant's agent, and that that notice was the cause of his writing to the plaintiff, only a week after the fire, to enquire if the building as well as the goods were insured. I very much doubt also whether the latter part of condition 10, which makes the furnishing sufficient proof of loss to the Company a condition precedent to recovery, relates to the notice of loss mentioned in the beginning of the condition. It is reasonable that a party should not recover until he furnishes sufficient proof of loss, but it would not be reasonable to deprive a party of his rights merely because he forgot, in the confusion attending an important calamity, to attend at

once to a matter of so little apparent importance. With the facts before us that the defendant's agent had prompt notice of the fire from some quarter, and that he raised no objection to the want of notice until it was too late to remedy it, the objection is not only futile but most ungracious.

I am of opinion that the evidence of amount of loss, although the Company may have had, before the trial, some ground for the suspicion of an exaggerated claim having been made, was sufficient to justify the jury in finding their verdict for the plaintiff. Both in preparing his preliminary proofs and in presenting his case to the jury, he labored under the disadvantage of having lost in the fire his invoices for the last two or three years and an account of his stock which he and his clerk had made up some three months before the fire. His books also were destroyed by the fire, and some accounts which had been previously made out by his clerk were accidentally destroyed before the fire. There is nothing in the case to raise any reasonable suspicion that the fire was set by the plaintiff, or that his books and papers escaped the flames and were collusively withheld. Admitting that the plaintiff and his clerk were to be believed, and their evidence appears to have been fairly given, the jury, who were the best judges, were justified in finding as they did upon the really substantial point in the case, which was as to the good faith of the plaintiff.

The next question for consideration is the violation of condition 16, by keeping kerosene oil in the building. This condition relieves the defendant Company from liability for loss or damage to buildings in which "is used or stored, camphene burning fluid, spirit gas, or any other article of which spirits of turpentine or alcohol forms a component part, unless the same be especially agreed upon and set forth in the policy."

Most certainly kerosene oil cannot, as urged at the argument, be classed under any of these compounds, and therefore it is altogether outside of this condition. If the objection is to prevail, it must be made under the clause of the policy which specifies "oil," along with "pitch, liquor, tallow, &c.," as hazardous goods, and requiring special notice to be given. Kerosene is in common language usually called an "oil." It is what is termed a "mineral oil," and I think as such may fairly come under the denomination of hazardous goods. In

the plaintiff's application for insurance he describes the building as lighted by kerosene, and he swears that there was none of that material in the building, except three or four gallons, which he sent from his residence to be used for the purpose of lighting the premises. This was in strict accordance with his rights under the policy. But the clerk proves that he sold these few gallons to parties who wanted it. The clause in the policy only affects it, "so long as the same should be so appropriated or used." The sale of the kerosene by the clerk left none in the premises whereby the policy could be vitiated.

I have had great difficulty in coming to a conclusion as to the sixth objection, viz.: there was no evidence that the magistrate who gave the certificate was the nearest Justice of the Peace to the locality of the fire. The objection was taken at the trial, but was not included specifically in the grounds for a new trial set out in the rule *nisi*. It was pleaded by the defendant, and therefore the plaintiff ought in prudence to have been prepared with specific evidence on the point. The evidence is very slight. The fire took place at Sable River, which we know, judicially, to be, not a town or village, but a country district several miles in length and breadth, and within which there may or may not have been resident several Justices of the Peace. The evidence is merely that the Justice resided at Sable River. It was left open to the jury with the other issues by the learned Judge, and found for the plaintiff.

I fully concur in the decision of the Court, delivered during the present term by SIR WILLIAM YOUNG, in *O'Connor* v. *The Commercial Insurance Company*, (Ante, 120.) It deals exhaustively, and with the ability which always distinguishes the judgments of the learned Chief Justice, with the general principle and with the particular facts of that case, but does not, I think, go so far as to decide that a condition of this kind must operate as an inflexible rule in every possible set of circumstances. I think it is still open to discussion whether there may not be circumstances in which a party insured might be permitted to pass by the most contiguous Justice of the Peace, provided that course were adopted in good faith for good and reasonable cause. The nearest Justice might be a lunatic, or in *articulo mortis*, and unable to attend to the duty, or he might be under suspicion himself as the incendiary who fired the premises, or

on terms of intense personal hostility with the assured, or he might possibly be, I am sorry to say, a very ignorant person, or of intemperate habits; and if this condition be enforced with inflexible rigidity, I would recommend every man before he insure his property to ascertain very carefully the character of his nearest neighbor in the commission of the peace.

In *O'Connor* v. *The Commercial Insurance Company*, the plaintiff applied to and was refused by several of the nearest Justices, who might, under the circumstances, have exercised a sound discretion in refusing; and, passing by several other Justices in the neighborhood, he obtained the certificates of two Justices residing at a distance of twelve miles from the fire. In this case the Justice certifying was in the same district, and there is no evidence that there was any nearer or other Justice residing in the district. In that case the condition required the certificates of the two nearest Justices. In this case the condition requires the certificate of "'*a*,' not '*the*,' magistrate or notary public most contiguous."

Under these circumstances, I have been strongly inclined, in the absence of any countervailing testimony, which might so easily have been given, to hold, that the evidence on this point, though slight, was sufficient to sustain the verdict. But, on mature consideration, I have come to the conclusion that the plaintiff, having notice by the plea and in the motion for non-suit, that this was one of the objections relied on by the defendant, ought not to have omitted to give the necessary evidence, if it was in his power to do so. Doubtless there were many persons in Court at the time who could have given evidence if called upon. I am the less reluctant to set aside the verdict because the fact as to the residence of the Justice can be readily ascertained, and, the case having been now reduced to that single point, further litigation will not be necessary. If the the plaintiff can give the evidence required, the defendants will undoubtedly pay the claim as found by the jury without further demur. If not, the plaintiff must either establish some sufficient reason, if any such be held possible, for not obtaining the proper certificate, or submit, however hard and cruel on the part of the defendants the case may be, to the consequence of his own negligence.

DESBARRES, J., said he concurred in the view that the verdict should be set aside for want of that proof which this Court in various cases had declared to be absolutely essential. The certificate should be from the nearest Magistrate. The Court often felt that it would like to relax that stringent condition, but it had no power to do so, and had over and over again held that it must be complied with. His learned brother in delivering the judgment of Court had said there were certain cases in which the nearest Magistrate might, as he thought, be passed over, but some that he had imagined could not possibly take place. For instance, the condition would not, of course, be held to apply to an insane man, and it was very doubtful whether it would apply to a drunken man.

SMITH, J., concurred, entirely upon the ground that that which the Court had held to be a condition precedent had not been complied with.

MOSHER *v.* DORAN.

WHERE no return was made by the Justices on a writ of certiorari directed to them, the Court held the objection a fatal one, refused to give judgment on the merits, and directed the papers to be sent back to the Magistrates, to deal with it as might be thought best.

DESBARRES, J., (now, March 12th, 1878,) delivered the judgment of the Court:—

A writ of certiorari was issued on the affidavit of defendant and others on the 13th day of June, 1876, directed to two Justices of the Peace for the County of Hants, before whom the defendant had been convicted of the offence of selling intoxicating liquors contrary to law, commanding them to send to this Court at Windsor, within ten days, the plaint and all proceedings had before them, together with said writ. It was objected by the plaintiff's Counsel, before entering into the argument, that the Court was not in a position to hear the case, inasmuch as the Justices had made no return on the writ, and that it had not been placed on the files of this Court. We proceeded with the argument on a representation made that the writ, though not produced, had actually been returned. On inspection of the original papers filed in the prothonotary's

office here, all of which have been forwarded by the prothonotary of the Court at Windsor since this case was argued, it appears that no return had been made by the Justices on the writ directed to them, and that, as the case was not then and is not now properly before before the Court, the argument ought not to have been permitted. The case of *Palmer* v. *Forsyth*, 4 B. & C., 401, shows that the objection taken by plaintiff's counsel for want of a return being made on the writ is a fatal one, and we cannot now give any judgment on the merits of the case, though after reading the affidavits submitted on both sides we were prepared to do so. All we can now do in the matter is to direct the prothonotary to send back the papers to the magistrates that they may deal with the case as may be thought best.

YORK *v.* McLAUGHLIN.

PLAINTIFF suffered injuries from falling through a trap-door opening through the sidewalk into the cellar of defendant. The Judge of the County Court, before whom the case was tried without a jury, found that the premises to which the trap-door was appurtenant, were in the occupation of defendant, and there was evidence which, had a jury been empanelled, would have had to be submitted to them upon that issue. Defendant gave no evidence to the contrary, and did not attempt to prove that the hatch had been left open by a wrong-doer. There was no evidence of contributory negligence.

Held that, (the appeal being under the Act of 1877,) the Court could not review the decision of the County Court Judge on the weight of evidence as to defendant's occupancy, (although it might, had there been no evidence, have said that a non-suit should have been ordered,) and that the judgment for plaintiff for $70 must be upheld.

THIS was an action brought in the County Court to recover damages received by plaintiff from falling through a trap door or hatch opening into the defendant's cellar, through the sidewalk. The cause was tried in the County Court without a jury, and judgment given for the plaintiff for $70. Defendant appealed.

McDonald, Q. C., for appellant.—There is no evidence that the place was defendant's; the only evidence is that the plaintiff was found in defendant's kitchen. There is not a particle of evidence that defendant ever owned, rented or occupied the shop where the accident occurred. There was no evidence that defendant had anything to do with the cellar. It cannot be inferred from evidence that defendant occupied the kitchen, that he occupied the cellar into which the trap opened. The occupation is not proved.

Assuming there was proof of the occupation, there is no negligence. The case *36 L. T., N. S.*, 589, cited below in support of plaintiff, is not relevant.

The City Council permits the sidewalks to be opened and trap doors to be inserted. Unless there is gross negligence he will not be liable. The mere fact of the trap being opened is not evidence of negligence on the part of any one.

There is clear proof of contributory negligence. *L. R., 6 Q. B.*, 481; *L. R., 1 C. P.*, 300; *L. R., 5 Q. B.*, 258; *L. R., 2 C. P.*, 631; *L. R., 1 Exch.*, 13.

Le Noir, Q. C., contra.—The Court must conclude on the evidence that defendant occupied the house and the cellar into which the trap door opened. The plaintiff was found insensible on these premises, in consequence of the fall. She had not moved from there until taken away. It was not for the plaintiff to assume that there were any specially dangerous circumstances about the place or she would have been on the look-out. The mere fact of her falling in proves that there must have been negligence.

1 Appeal Cases, 758, *i. e.*, *Radley* v. *London & N. W. R. Co.*, reviews all the cases on contributory negligence. *4 C. & P.*, 262; *4 C. & P.*, 337. A person may be walking along the street and turn to look at a shop window while moving; supposing him to fall into one of these traps, is that contributory negligence? Even if the plaintiff's negligence has contributed to the accident, yet if it might have been prevented by a fair degree of care on the part of defendant, he is not excused.

The case cited from, *36 L. T., N. S.*, 589, decided that the party occupying the house was liable.

McDonald, Q. C., in reply.—In the case in *1 Ap. Ca.*, the law was stated that if both parties contributed, the plaintiff could not recover. We complain of the finding here in regard to the facts. There is no proof of the facts necessary to shew negligence on the part of this defendant.

McDONALD, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This action was brought in the County Court to recover damages for injuries received by the plaintiff in consequence of alleged negligence on the part of the defendant in leaving

open a trap door or hatch opening into his cellar through one of the side-walks in this city in front of his shop, by reason of which the plaintiff fell through the opening and was injured. The evidence is either very defectively given or very imperfectly reported; but the facts, as far as I can understand, appear to be that the defendant occupied the building in front of which the hatch was left open, and that, while it was open, no one was present to caution those who passed along the side-walk of the danger that awaited them. The plaintiff, while walking along, fell in and was much hurt. The cause was tried without a jury before the learned judge of the County Court, who gave judgment in favor of the plaintiff for $70 damages, from which judgment the defendant appealed to this Court, under the Act of 1877, amending that of 1874, respecting County Courts. We are not at liberty to enquire whether or not that learned Judge decided strictly according to the weight of evidence; but we have the power to say whether or not a non-suit should have been ordered by him, so that what we have now to decide is whether there is evidence upon the questions of fact in issue which, if a jury had been sworn in the cause, should have been submitted to them. It has been objected that there was no evidence that the defendant was at the time of the accident in the occupation of the building to which the trap door was appurtenant; but I am of opinion that there was sufficient evidence to go to a jury. The cause was tried in this way. Susan Sheridan is reported to have testified thus;—"My husband away; McLaughlin home; defendant tenant, my last." On cross-examination, she says;—"My husband owns house. I know nothing of the business with McLaughlin or the tenancy except from what my husband says." The meaning of this appears to me to be, that the husband of the witness is the owner of the building, and the defendant his tenant, and it is useless to object that there is no evidence of legal tenancy, so long as it appears that the defendant was the occupant of the premises at the time of the accident. Margaret Willis "saw the plaintiff sitting in the defendant's kitchen after the injury. He showed her, (witness,) through the shop into the kitchen, and showed her the place where the plaintiff fell through the trap in front of his shop window." This evidence, with that

of several other witnesses, could not, in my opinion, have been legally withheld from a jury if empanelled to try the cause; and the Judge, who in this case was invested with the functions of a jury, having found that issue in favor of the plaintiff, we are not at liberty, under the law, to question his finding.

The next question is, assuming the defendant to have been the occupant of the building, is he liable for the injury complained of, in the absence of evidence of contributory negligence on the part of the plaintiff. I am decidedly of opinion that one who occupies a building, having for the convenience and use of it a trap-hatch opening from it on a public thoroughfare, is bound to use proper precaution to save the public from being killed or injured by falling through the opening. It has been suggested that it was possible some wrong-doer might have thrown up the hatch and left it in that condition before the accident happened, but I think that in a city like this it would be negligence on the part of the occupant of a building to leave such a hatch so insecure that even a wrong-doer could, without extraordinary exertion or detection in open day-light and in a public thoroughfare, have thrown it open in the way suggested. Common prudence and care even for the safety of the building into which it opened and its contents would require different conduct on the part of the defendant, even if we put out of sight the fact that the occupant of the building should guard against such a contingency as has been suggested, by securing the hatch. Legal principle alone would, in my opinion, take this view if the question was a new one, but it is not new. *Proctor* v. *Harris*, 4 C. & P., 337, is a case which sustains the judgment of the learned Judge who tried this cause, and *Daniels* v. *Potter et al.*, reported in the same volume, p. 262, is quite decisive. In the latter case it was decided that a tradesman who has a cellar opening upon a public highway is bound, when he uses it, to take reasonable care that the cover of it is so placed and secured that under ordinary circumstances it shall not fall down. But it was also laid down as law that, if the tradesman had taken the *proper precaution* and a wrong-doer threw it over, the tradesman would not be liable. In that case evidence was given for the defendant that the flap was thrown open by

boys who were playing about the place after having been warned by the parties in the shop not to do so, and yet the plaintiff recovered. Not even that evidence was given in this case, nor was the defendant called to contradict any part of the plaintiff's evidence, his counsel being content simply to suggest the possibility of such a contingency happening as a wrong-doer throwing open the trap. Neither did the defendant or any other witness testify that he was not the occupant of the building, which he ought to have done if the evidence on behalf of the plaintiff on that question was not true.

But it is said that there was such contributory negligence on the part of the plaintiff as exonerates the defendant from liability. *Saunders*, in his work on *Negligence*, says that, although the defendant may have been guilty of negligence, yet, if the plaintiff has been guilty of such negligence that the accident would not otherwise have happened, he cannot recover damages, for he cannot complain of any injury which his own negligence has contributed to bring about. See also *Tuff* v. *Warman*, 2 C. B., N. S., 740. In *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W., 242; PARK, B., said; "Although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequence of the defendants' negligence, he is entitled to recover; if, by ordinary care, he might have avoided it, he is the author of his own wrong." The last case, however, is *Radley et al.* v. *The Directors of the London & N. W. Ry. Co.*, 1 L. R. Appeal Cases, 758, in which it is again held that, "though plaintiff may have been guilty of negligence, and although the negligence may in fact have contributed to the accident which is the subject of the action, yet if the defendant could, in the result, by the exercise of care, have avoided the mischief, the plaintiff's negligence will not excuse him."

Following this last and authoritative decision, the question in this case on the point of contributory negligence appears to be, not whether the plaintiff was guilty of some negligence which may have contributed to the accident, but whether the defendant could by the exercise of ordinary care, have avoided the mischief. If it was, as the Judge found, negligence, (which means, want of ordinary care), on the part of the defendant to have allowed the hatch to remain open and

unsecured, he certainly could, by the exercise of ordinary care, have shut it down, if not secured it. The case is not the same as if he had endeavored to secure it down and failed to do so sufficiently, after using ordinary care in so doing, but it is a case in which no endeavor or care whatever appears to have been used in a matter involving the safety of the public who had a right to use the side-walk. If ordinary care had been used by the defendant he should, if he could, have proved it in answer to the case of the plaintiff, but he did not do so. I fail to find any evidence of contributory negligence on the part of the plaintiff, unless the fact of her falling into the hole be negligence, which it clearly is not. She had a right to walk along the sidewalk, and to expect that those who used it for private purposes, (other than as the public used it,) might do so in the ordinary way without endangering their lives or limbs in walking over it, and we know, as a matter of fact, that in such a thoroughfare as that in which the accident happened, it is very difficult to see an opening of the kind in question until it may be too late. If there was any doubt of that fact, the evidence of Charles Palmer would set it at rest. He says that he was passing north, the plaintiff coming in the opposite direction, when he saw her only five or six yards off. Presently he saw her, yet he did not see the opening until he saw her fall into it. Is it not probable from the evidence that he would have fallen into the trap if she had not got there first?

I see no reason whatever to disturb the judgment of the learned Judge who tried the cause.

TAYLOR v. McFARLANE ET AL.

To an action on a promissory note given for the value of shares in a registered vessel, transferred by bill of sale from plaintiff to the defendants, the defendants set up as a defence an oral agreement that the note should not become due until the actual delivery of the property, which, as a matter of fact, had been seized in execution before defendants obtained actual possession.

Held, that the alleged agreement could not be admitted to vary the terms of the defendants' unconditional written promise.

Defendants accepted and registered the transfer of the shares, and demanded possession of the vessel, asserting their right as *bona fide* owners, yet they attempted to set up fraud as an answer to this action, not specifying whether such fraud was against themselves or against a third party.

Held, that defendants could not sustain the verdict in their favor on this point without showing that they were induced by fraud of the plaintiff as against themselves to make the note in question.

THIS was an action on a promissory note, to which defendants, by their fifth plea, pleaded that the note was given for goods which were to be delivered, but which plaintiff failed to deliver; and, by their sixth plea, that the defendants were induced to make the note in question by the fraud of the plaintiff. The goods referred to in the fifth plea consisted of shares in a registered vessel which were transferred by plaintiff by a bill of sale, but before defendants got delivery the shares were seized under an execution. The nature of the fraud relied on under the sixth plea was not specified in the plea, and it did not form an important element in the cause. JAMES, J., who tried the cause, stated in the course of the argument that the attempt to show fraud had broken down altogether. The matter came before the Court on a rule *nisi* to set aside the verdict which was for defendant.

Thompson for rule.—There was a sale of a British vessel effected 2nd March, 1874, for $100, and a bill of sale given as the instrument of title. The date of the note is the same, March 2nd, 1874. It is alleged in answer that there was a fraud in making the bill of sale appear to be executed for a larger consideration; secondly, that there should not only be title, but delivery, before the note should be called for; and, thirdly, that the seizure under execution deprived the defendants of the benefits of the purchase, and therefore they should not be called upon for the amount.

The first ground furnishes no answer to the action. They say that the consideration was raised from $100 to $400, because it would not look well to put it at $100. (JAMES, J. The fraud broke down altogether, as there was no evidence to sustain it.) It was not fraud to defeat this action, because it was to defraud another. If it was a fraud, it was fraud on the part of both plaintiff and defendants. It is just as if I sold a man a piece of land for $400, and $500 was put in the deed to appear well, and the vendee contended that I was not entitled to my $400. If it was a fraud in the original bill of sale, that bill of sale was abandoned and a new one drawn up in which the true consideration was stated. The original bill of sale is not an instrument of title. It is not in the case. The contention is that the original bill of sale was intended to

defraud Ross, a third party, which it could never have done, as he never saw it.

In the second place, they contend that they were to get delivery of the vessel, otherwise the notes were to be burned. They got an instrument under which they could have got possession at any time. Defendants took the bill of sale and put it on record. The omission to insure their interest is admitted by the father to have been his fault. He might have ejected the captain and taken possession. There is here at least a part performance, the bill of sale being executed and accepted. *Cahoon* v. *Morrow*, 1 Old., 148.

Where the jury found there was no fraud, and the evidence was that there was fraud, the Court has decided that the verdict should be set aside. A *fortiori*, the Court will set it aside if fraud is found, with no evidence.

Graham, contra.—The plaintiff is trying to recover twice the same money. He was paid once, as he was credited on a judgment of Ross, and he now seeks to recover the notes for which the defendant got no value at all. Ross got possession of the vessel and sailed her.

There is a failure of consideration of the notes. *4 B. & Ad.*, 638; *13 M. & W.*, 94. The question of registry conveying title does not come in at all, as there was an express agreement that the defendant should not only have title, but delivery as well. The fact that nothing was done with the action of trover raises a strong inference in our favor, that we tried to get possession but could not. *17 C. B., N. S.*, 708; *5 M. & W.*, 7. It was provided by the agreement between them that if the possession could not be got the notes should be burned. The sale was a conditional sale, and did not pass the property. *6 Moore, P. C.*, 134; *Benjamin on Sales*, 235; *Byles on Bills*, 101. The question is always what was the intention of the parties at the time of the sale, and that has been found in this case by the jury. Our contention is, that if the defendant did not get possession of the vessel, the sale should be off, and the notes should have no effect, and should be destroyed. The jury have found that that was the contract.

Taylor says he heard of the sale of vessel by the Sheriff, and he can't tell whether it was before or after the bill of sale.

Thompson, in reply.—The defendant bought the vessel with his eyes open, knowing the difficulty about the matter, with the understanding that if he got his sale completed first, the notes should be valid, and the defendant did get his bill of sale, and defeated Ross' sale from the Sheriff, getting his bill of sale on record first.

Ross never gave credit, and if he now issued execution on his judgment, including the $400, it would be sustained, under *Cahoon* v. *Morrow*. Although he may have entered a credit on his books, he never did so on his execution. The judgment and the execution stand without any credit. The defendants took the risk of getting their bill of sale on the registry first, and they succeeded in doing so. There is no act that plaintiff could have done that he did not do in performance of his contract. The defendant got a bill of sale, which enabled him to insure the vessel, which he did not do, and to bring an action of trover, which he did. The plea of want of consideration failed.

The cases cited contra are of goods sold in which the vendor had no title. Under those cases, Ross, if he gave credit, having got no title, could expunge it.

McDONALD, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This action was brought on a promissory note made by the defendants, dated 2nd March, 1874, payable twelve months after date, and the only pleas supported by any evidence are the fifth and sixth. The fifth alleges that the note was for the price of goods to be delivered by the plaintiff to the defendant before the note would become due, averring readiness on their part to acept the property, and failure on the part of the plaintiff to deliver it. The goods mentioned in the plea appeared, by the evidence, to be shares in a registered vessel, which were transferred to the defendant by a bill of sale in the usual way. The sixth plea alleges that the defendants were induced to make the promissory note in question by the fraud of the plaintiff, but it does not show in what the fraud consisted. There is some evidence in support of both pleas, though in one view of the case there is very little in support of the sixth.

The first enquiry is, therefore, whether the fifth plea is a sufficient answer to the declaration, assuming it to have been proved; and we must then see whether the evidence is sufficient to support the sixth plea, under the charge of the learned Judge who tried the cause, and who it appears to me did not sufficiently define to the jury the particular species of fraud which would vitiate the transaction as between the parties to the suit.

In reference to the fifth plea and the evidence in support of it, several cases were cited to show that there was a failure of consideration, but neither of them is in point, because all of them turned upon the question as to whether or not the property sold under parol agreements had passed to the defendants. In this case there is no room to question the legal transfer of the property, for the value of which the note was taken, from the plaintiff to the defendant by a bill of sale, proved to have been executed and registered according to law, and therefore the cases cited do not apply. Then arises the question, whether the alleged parol agreement that the note should not be payable till the actual—not constructive—delivery of the property should be given, is an answer to a suit upon a promissory note given for the value of the property and payable at a certain time. I am of opinion that it is not a sufficient answer in law, in the present case. A promissory note "must be payable absolutely and at all events, and payment must not depend upon a contingency." *Byles on Bills*, 93, and authorities there cited. It is true that a note payable on the death of A or B, or of the maker, is good, because such events must certainly happen; but a note payable on a contingency which may never happen is not good. *Byles on Bills*, 95; *Clayton* v. *Gosling*, 5 B. & C., 360.

If the facts pleaded in fifth plea appeared on the face of the note, it would not be good for the reason given; but they do not so appear, and we are obliged to enquire whether or not a promissory note, valid upon the face of it, and given to secure the payment of the price of property legally transferred, can be avoided by oral evidence of conditions such as are set up here as a defence. In *Foster* v. *Jolly*, 1 C. M. & R., 703, Lord ABINGER, C. B., said that "the maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you

upon a contingency'; that is at variance with his own written contract." PARKE, B., said; "the general rule is that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note, but he is not permitted to contradict the express contract to pay at a specified time." ALDERSON, B, said; "Here the note contains an engagement to pay at a specified time, namely fourteen days, and evidence is offered to show that this means that the note should be paid on the occurrence of an event which may happen either before or after the expiration of the fourteen days. Such evidence falls within the general rule that matters in writing shall not be contradicted by parol."

I am decidedly of the opinion that the decision in the case just cited is based upon sound legal principle, and that the case must be controlled by it so far as the issue raised by the fifth plea is in question.

The sixth plea, at first, seemed to present some difficulty, inasmuch as it sets up the defence of fraud, without specifying whether such fraud was against the defendant or against third parties, who have nothing to do with the suit; but I think that *Shaw et al.* v. *Jeffery*, 13 Moore's P. C. C., 432, settles the question. It was there held that where an instrument had been entered into between two parties for a purpose which might be considered fraudulent as against a third party, it might yet be binding as between themselves. Lord Chief Justice KNIGHT BRUCE said that "a mere suspicion of fraudulent intention to protect the property against the just claims of other persons will not suffice to show that the transaction was wholly colourble as between the plaintiffs and defendants themselves; nor, if the transaction is to be treated as a real transaction, such as it appears on the surface as between themselves, which their Lordships consider it ought to be, will it be vitiated and rendered of no avail because it may have the effect of defeating the claims of other creditors." In this case there is strong evidence that the defendants intended to take the benefit of their agreement with the plaintiff, and that the transaction was not merely colourable. They not only accepted the transfer and had it registered, but they actually demanded possession of the vessel from the party in possession,—asserting their right under

the law as *bona fide* owners. It was, however, their duty, if they relied upon the fraudulent nature of the transaction, to have repudiated it as soon as possible; *Byles on Bills*, 132. But instead of repudiating it, they appear, by the evidence, to have attempted to get possession of the property, and to have tried to profit if they could by the transaction which they now call fraudulent when it is impossible for them to profit by it. It is true that the case of *Fivaz* v. *Nicholls*, 2 C. B., 512, appears, at first sight, opposed to this view, but that was decided in favor of the defendant on the ground that the plaintiff could not make out his case except by showing an illegal transaction to which he himself was a party. In that case the plaintiff's declaration showed the illegality of the transaction; here it does not. I am of opinion that the verdict must be set aside, and a new trial given, when, if the defendants can show that they were induced by the fraud of the plaintiff as against themselves to make the note in question, they may succeed in the action.

JAMES, J., said he was of the opinion now, that he should have gone further than he had done on the trial of the cause, and should have withdrawn the question of fraud from the consideration of the jury.

ELLIS ET AL. *v.* COLONIAL MARKET COMPANY.

THREE of the plaintiffs in an action of ejectment were clearly shown to be entitled to the possession of the land claimed, as tenants in common with others who were not joined in the action as plaintiffs.

Held, that the verdict, which was for plaintiffs, could not be set aside on the ground that the other tenants in common were not joined, or that the verdict did not state the proportion in which plaintiffs were entitled, the practice of this Court differing in this respect from the English practice.

THIS was an action of ejectment in which the plaintiffs claimed possession of certain land and obtained a verdict. The importance of the case as a precedent depends wholly on the point of practice stated in the head-note.

MCDONALD, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

The verdict in this cause could not stand if the suit had come to trial, as it was commenced, in the name of Ellis alone

as plaintiff, and, therefore, I will proceed to the consideration of the case on the title of the added plaintiffs, the devisees of the Hon. Michael Tobin; first mentioning that there is no evidence whatever of title by possession in the defendants. It is both proved and admitted that Hon. Michael Tobin and Hon. James Tobin were formerly the owners of the lot of land on which the dispensary now stands, and there is not the shadow of a doubt left by the evidence that the gore, so called, which is the place actually in question, was a part of that lot, the plaintiff having made out an exceedingly strong case upon the question of the original boundary. Witness after witness proved where it was, from personal knowledge and observation, several of them having been occupants of the premises, and one of them having proved that even at the time of the trial he could trace the foundation walls along the lane now used by the defendant Company. The evidence on that point is so lengthy and so strong that comment upon it is unnecessary, and the jury could not legally, upon that issue, have found otherwise than as they did. Had they found for the defendant on that point their verdict would, of necessity, have to be set aside. Even if there had been a doubt as to the boundary, it was a question for them to decide, and they, having found for the plaintiffs, their verdict cannot be disturbed as being against the evidence.

Much reliance was placed, at the argument, upon the evidence of one of the surveyors, but I am at a loss to see the reason why. The property being proved to have been that of the Tobins, the defendants, who do not claim under them and who were no parties to the surveys, could neither have lost nor gained anything by the mere running of the lines; and if the whole property did not pass to the grantees of the Tobins, under the deed which described the lands conveyed according to the survey, then the title to the ungranted part remained still in the Tobins, some of whose representatives are now co-plaintiffs with Ellis. I am of opinion that the title to the gore did not pass from the Tobins to Ellis and those under whom he claims, and the only question to be considered is whether the devisees of one of the tenants in common, (the two Tobins') can uphold this verdict—the representatives of the other tenant in common, I mean of James Tobin, not having

been joined in the action as plaintiffs. By his last will, Michael Tobin clearly devised his interests in the land in question to three of the four plaintiffs whose names now appear on the record, namely; the Honorable (now Sir) William Young, Michael Tobin, Junr., and Rebecca Tobin, trustees, &c. The other plaintiff, Ellis, claims through them under a deed which, though it covers the land actually in question here, that is, the gore, yet appears to have been executed without strictly complying with the requirements of the will. There being really no room to doubt the legal title of the devisees of Michael Tobin to the possession, as tenants in common with the legal representatives of James Tobin, their right to succeed in this action depends entirely upon the practice of this Court in actions of this kind, and upon the statute which regulates that practice.

Our Practice Act provides that the form of the writ of summons shall be that given in the schedule No. 16, which form simply alleges that the defendant withholds the possession to which the plaintiffs or some or one of them claim to be entitled. The writ does not claim the *exclusive* possession of the premises, but the possession which the defendant withholds, and to which the plaintiff is entitled, though only as tenant in common. Section 295 of the same act provides that the defendant's plea shall be confined to a denial, in whole or in part, of the plaintiff's right to the possession claimed, or to a right of possession in himself with the plaintiff, or to a denial that he was in possession of the whole or any part of the premises, at the time of the action brought, and is not withholding the same. He is not permitted, therefore, to plead that the plaintiff is tenant in common with a third party who is not joined in the action as plaintiff; but yet one of the grounds taken against the verdict is that it appears by the evidence, that some of the tenants in common were not joined, as if that which cannot be pleaded as a legal answer to the plaintiff's declaration, is still a legal defense. A tenant in common of undivided property is entitled to possession of every inch of it,—only possession with the other tenant in common, it is true, but still possession.

The question, under the writ of summons and pleas prescribed by our statute, is, not whether the defendant withholds

the possession to which *all* the owners may be entitled, but whether he withholds the possession to which the particular claimant, from whom whom the possession is withheld, is entitled. It is true that section 290 requires that "the names of all the parties in whom the title is alleged to be" should be mentioned in the writ, but that, of course, means the correct christian name and surname of each of the claimants in whom the title is alleged to be, and *from whom the possession is withheld*. *Cole on Ejectment*, 93.

The objection was taken that the verdict does not state the proportions in which the plaintiffs are interested, and it would seem that in England an enquiry of that kind is necessary, under section 180 of the Common Law Procedure Act, which says that the question at the trial shall be whether the claimant is entitled in whole or in part, *and, if in part, then to which part*; but our Practice Act, section 303, which in other respects is to the same effect as the section referred to, does not contain the words, "if in part, then to which part," and I have no doubt that the Legislature of this Province did well to omit these words, in view of our particular circumstances and the spirit of our Practice Act, which in other respects differs very much from the English practice in actions of ejectment. *Our* writ of ejectment is directed *to the Sheriff*, commanding him to summon the *particular person or persons* alleged to be withholding the possession to which *the plaintiff* is entitled, and notifies the defendant to defend the possession, or that judgment will be entered against him, &c. In England it is addressed not to the Sheriff, but to (Y. Z. and) *all persons entitled to defend the possession of the premises*, and it summons such of them as deny the alleged title of the plaintiff to defend the property or such part of it as they may be advised, and notifies them that the plaintiff *claims the right to eject all other persons therefrom.*

Formerly in England the verdict would be entered for the whole, although the lessors of the plaintiff were only entitled among them to a moiety of the premises. *Doe* e. d. *Blight* v. *Pett*, 11 A. & E., 842; *Roe* e. d. *Raper* v. *Lonsdale*, 12 East, 39. Before the Act, 15 & 16 Vic., chap. 76, sec. 180, any one tenant in common without the others might have recovered his undivided part or share under a separate demise. *Cole on Eject-*

ment, 286; *Bul., N. P.*, 107; *Adams on Eject.*, 167. The plaintiff, when in such case, taking possession, would have to be careful at his peril, not to disturb any person who would be entitled to possession with him, and to take no more than his right.

That has continued to be the practice in this Court down to the present day, our Practice Act having carefully avoided, as it appears to me, making any change in that respect. It is clear that the intention of the representatives of Mr. Tobin was to have conveyed to Ellis all their title to the lot of land of which the gore, so called, was unquestionably a part. Ellis, who is the party really interested, is simply claiming the possession of the property which he then agreed to purchase, and did purchase, from the parties entitled. He has a right to use the names of the added plaintiff for the purpose of recovering the possession of the property which he purchased from them, and it is quite clear that, as alleged in the writ, the defendants are withholding the possession to which the plaintiffs, *or some or one of them*, namely, the devisees of Michael Tobin, are entitled.

By section 94 of our Practice Act, it is enacted that the joinder of too many plaintiffs shall not be fatal to any action, but the plaintiff or plaintiffs entitled may recover.

I think that judgment must be entered in favor of the added plaintiffs, but as the name of Ellis was unnecessarily continued as plaintiff on the record, while he had no legal title, thereby giving some ground for argument upon a point of practice now for the first time decided under our present Act. I am of opinion that the costs of the argument ought not to be allowed.

The notes of a dissenting opinion prepared by WILKINS, J., who was absent, were read by JAMES, J. In the opinion of the dissenting Judge the evidence immensely preponderated for the defendant, and the rule should have been made absolute. His Lordship's opinion being in favor of the defendant, his attention was not directed to the questions of practice decided by the Court.

O'MULLIN *v.* McDONALD.

THE Court has rarely permitted affidavits to be produced under sec. 15 of the Evidence Act, R. S., cap. 96, and in the few cases in which they have done so, such course has been rendered necessary to prevent the grossest injustice or to vindicate the standing of members of the Bar. On argument of a rule to set aside a judgment obtained against defendant on the ground among others that the judgment had been entered in fraud of defendant and against good faith, the Court refused to allow defendant to produce affidavits in support of his rule where the affidavits of plaintiff contained no new matter except in reference to the title of the defendant to the land on which the judgment formed a lien.

There was a variance between plaintiff's and defendant's statements as to the consideration for which the confession was given, plaintiff having deposed that it was for the indebtedness to him of defendant's brothers who had become insolvent, and that he had agreed to credit them with further supplies of goods upon being sufficiently secured. Defendant deposed that the security was given wholly for future advances of goods and obligations to be incurred by plaintiff on account of the insolvent, and that plaintiff had wholly refused to carry out his part of the contract. Plaintiff, when confronted with the facts as deposed to by defendant, admitted that defendant's statements were true, but contended that the judgment was not sufficient for the purposes for which it had been given, and said that he held it as a security for the past indebtedness of the insolvent, (for which he had accepted a compromise). The judgment was set aside.

IN this case an application was made to set aside a judgment entered upon a warrant of attorney executed by the defendant, on the ground that the warrant of attorney was given to plaintiff as security for a debt due plaintiff by the defendant's brothers,—who had become insolvent and compromised with their creditors,—on condition that plaintiff should do certain things, which plaintiff afterwards refused to do, and that the judgment was entered against good faith. An order *nisi* to set aside the judgment was granted June 5th, 1877, upon several affidavits. The rule was returnable June 12th, 1877, when plaintiff's counsel read an affidavit of plaintiff in shewing cause.

Rigby, Q. C., for defendant.—The warrant of attorney here was executed by an illiterate person, by his mark, before a witness; the instrument does not, on its face, bear any statement that it was read over to him before execution. The plaintiff claims to hold it as security for his debt against defendant's brothers, insolvents, though he is assignee of the estate. He refuses now, though admitting that the security was, at least partly, for credit to be given by him to the insolvents, to give that credit. His attempting to hold the security for his original debt against the insolvents is a fraud upon their other creditors. The policy of the law is clearly shewn in the Insolvent Act of 1875. As to this Court setting the judgment aside, see *Ch. Arch., Pr.*, 986; *Best on Evidence*, 1657.

Thompson, contra.—The point that the security is against the policy of the Insolvent Law is not taken in the application here. The cases, however, are numerous to the effect that a security given after insolvency, not to procure consent to compromise or discharge, will be sustained. The warrant reads on its face, "signed, sealed and delivered in presence of, having been first read over and explained." O'Mullin's affidavit says, it was read over. The burden rests upon the party seeking to set a judgment aside of making his proof clear and conclusive. The affidavits of defendant and his brother, one of the insolvents, are contradictory and insufficient, and are fully met by the affidavit of plaintiff. The plaintiff's affidavit shews that the security was not what was stipulated; when it is completed, plaintiff will give the credits and supply the goods. Plaintiff swears he is liable for six months' rent, $240. Before moving to set the judgment aside, the defendant should at least have tendered the costs of entering it, having procured the plaintiff's taking it.

Cites *2 H. Blackst.*, 383; *2 A. & E.*, 439; *1 Dowl., N. S.*, 774; *Cowper*, 727; *2 Jurist*, 11.

Rigby, Q. C., in reply.—The rent plaintiff refers to in his affidavit is not the rent he was requested to go security for, but rent for which he was responsible before the insolvency. Plaintiff does not contradict defendant's statement that he refused to become security for rent and to give credit to allow the insolvents to re-commence business. There is nothing in the affidavits to show that the security given was not ample for the purpose stipulated. There is no evidence now of the actual value of the security, or of the value represented by defendant previously to its being given.

SMITH, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This is an application made to the learned Chief Justice at Chambers on the third of July last to make absolute a rule *nisi* to set aside a judgment entered up by the plaintiff against the defendant, and to cancel the warrant of attorney on which the same was founded, on the following grounds:

First; Because the said judgment was entered and held by plaintiff in fraud of defendant and against good faith.

Secondly; Because the said warrant of attorney was obtained from the defendant through the fraud of plaintiff without any consideration.

Thirdly; Because the consideration for the making of the said warrant has wholly failed through the default and fraud of the plaintiff, and on the various other grounds set forth in the said affidavit.

The undisputed facts appearing from the affidavits on both sides, are these; that Henry McDonald and Michael McDonald were, in the year 1877, doing business at Dartmouth, under the style and firm of McDonald Bro's, and that they became embarrassed, and in the month of April of said year were thrown into insolvency by a writ of attachment, under the Insolvent Act of 1875; that a meeting of the creditors on the 18th day of May of same year took place, and that a compromise was effected, by which the defendants agreed to pay fifty cents on the dollar in four years by four equal instalments, and that the plaintiff was duly appointed assignee of the estate of said insolvents, and accepted and expressed his satisfaction with such compromise. The statements of what subsequently took place between the insolvents, the defendant and the plaintiff in relation thereto, and upon which, the liability of defendant is sought to be established under the warrant of attorney and judgment, are in some respects at variance, as touching the consideration for which the judgment was entered. There is also a variance between them as regards the nature of the security intended to be given by the defendant, but if this were the only element of dispute it would require much stronger evidence than I find in this case to disturb a judgment entered up under a warrant of attorney deliberately given. At the argument before the learned Chief Justice an application was made to produce affidavits of the defendant in support of the rule, in answer to the plaintiff's of the 12th of June, as I apprehend, under the 15th section of our Evidence Act. cap. 96, R. S. The learned Judge did not decide to receive them, but granted a rule remitting the rule *nisi*, "the affidavits and papers therein mentioned to the full Court that they may exercise their discretion under the Evidence Act." The Court has very properly, as I apprehend, rarely permitted such affidavits

to be produced, and the few cases in which they have done so have been most exceptional, and as having been rendered necessary in order to prevent the grossest injustice, or to vindicate the standing of members of the bar. To adopt a different practice would clearly open a door to an undisciplined manner of conducting arguments, and produce inextricable confusion. The plaintiff's affidavit in this case is one which simply gives his version of the circumstances under which the warrant of attorney was given in contradistinction to that of the defendant. I can perceive no new matter in it except that referring to the title of the defendant to the land which is alleged to have been represented by him as unincumbered, and this I do not conceive to be of such importance as to induce the Court to depart from a rule they have adhered to so salutary and effective. I think the affidavit should not be permitted to be used.

Let us now enquire upon the affidavits which are properly before the Court, whether the judgment can be sustained. For my part I can see no possible consideration for it. The defendant's brothers are thrown into insolvency; they compromise with their creditors, one of whom is the plaintiff, who becomes the assignee of the estate. He accepts the position in the interest of all. The defendant has no interest in, nor is he in any way connected with the estate. The insolvents thus released from their liability desire to re-commence business, and, according to the statement of Michael McDonald, he "made an arrangement with said plaintiff on behalf of said McDonald Bros. for the purpose of establishing them in business again, by which said plaintiff agreed to furnish McDonald Bros. with what goods they might require in their said business, and to become their surety for payment of the rent of the premises occupied by them for the next ensuing year, on their giving to him, plaintiff, as security therefor, the bond or other security of his brother James McDonald, the defendant," which security was given at the time to the satisfaction of plaintiff, this being the warrant of attorney on which the judgment in question was entered. The plaintiff's affidavit sets out the understanding on which the security was given to some extent differently. He says, "the said Michael McDonald informed me that in consideration of the assistance I had

rendered said insolvents while they were in business, by becoming security for the payment of the rent of the premises occupied by them and for otherwise assisting them, I would lose nothing on their account, and he promised to secure me the amount of my claim against their said estate, and subsequently stated that he would expect me to supply them with goods on credit if he gave me good security therefor, and I replied that I would not furnish them with any goods in the event of their commencing business again, unless they gave me good and sufficient security, both for the amount of their indebtedness to me, and for the payment of any goods that I should thereafter furnish." He says that one Berry was offered conjointly with the defendant, but ultimately defendant alone was accepted. It cannot but fail to strike the mind of anyone that this version of the transaction is singularly at variance with what would naturally occur between the contestants under all the circumstances surrounding the position of the parties. That the defendant should, with a knowledge of the arrangement come to between the creditors and his insolvent brothers, engage to pay their debt in full to the plaintiff, even for the consideration mentioned, seems to me incredible. He was under neither legal nor moral obligation to liquidate the debts of McDonald Bros., and, more especially, liabilities discharged by a valid compromise. The plaintiff does not pretend to deny that the judgment was based not only on this singular consideration, but on his undertaking to furnish defendant's brothers with goods, to give them "a start," as he terms it, as well as to become surety for the payment of the rent of their place of business. He avows the fact that he has done neither the one nor the other, except what on the first blush might be inferred from his statement, in which he says, "besides the debt due me by insolvents, for which said judgment was given, I am liable for six months rental of the said premises, and will likely be obliged to pay the same; the amount due for said rental is two hundred and twenty-five dollars." I cannot well comprehend how this indebtedness could exist consistently with the facts. I am not surprised at the qualifying expression, "will *likely* be called to pay." The meeting of the creditors took place May 18th, 1877. The agreement between plaintiff and defen-

dant was made a short time subsequently. According to defendant's affidavit, the rent for which plaintiff was to become security, was to commence on the *12th June, 1877*, the very day the plaintiff's affidavit was made, and seven days after the rule *nisi* in this matter was granted. Plaintiff does not aver that he became security for such rent, as contemplated by the agreement, and I think it abundantly clear that he did not. If any doubt could exist upon this point, I imagine that the affidavit of Mr. Barss sets it entirely at rest; not only does it do this, but it corroborates the whole statement of the defendant in reference to the real nature of the transaction. Mr. Barss says that he went to the place of business of plaintiff in company with Michael McDonald, and "on confronting him with the facts as they had been stated to me by defendant, as aforesaid, the plaintiff admitted to me that the defendant's said statement of the case was true, but said that the security given by defendant was insufficient for the purpose for which it had been given, and that he intended to hold the judgment which he had caused to be entered up as a security for the payment of the debt owed to him by said McDonald Bros. at the time of their insolvency."

Now, let us see what was the statement made to Mr. Barss by defendant and communicated to plaintiff, and admitted to be correct. Mr. Barss swears that he was retained by the defendant on the *28th May* last, *i. e.*, 1877, who complained that he had signed a bond or other paper writing in favor of plaintiff at the instance of his brothers Henry and Michael McDonald, as security to enable his said brothers to get supplies from plaintiff, who had also promised to go surety for the rent of the premises then occupied by his said brothers in Dartmouth for the purpose of re-establishing them in business, and that said plaintiff had refused on getting said security to perform his part of the contract." There is no denial of this by the plaintiff, and it can scarcely be contended, if this be correct, that to permit a judgment obtained under these circumstances to be upheld, would not be unjust against the defendant, and in breach of fairness and good faith.—I am of opinion the rule should be made absolute.

IN RE SCHOOL SECTION, No. 29.

Section 34, sub-section 8, of the chapter of Public Instruction, R. S. cap. 32, provided that it should be the duty of the Trustees to call a special meeting of the section, due notice being given by the school or otherwise, for the purpose of, &c., and for any other necessary purpose. Section 37 required the Trustees, upon the requisition of a majority of the rate-payers, to convene a special meeting of the rate-payers for the purpose of voting money or adding to any amount previously voted. At the annual meeting of school section 29 the money required for schools was not voted, and the meeting instructed the Trustees to call another meeting for the purpose, which they did, but acted under the impression that the meeting must be called under a requisition, as provided by section 37. The matter was brought up by certiorari, and a rule nisi taken to set aside the assessment, the affidavits on both sides being drawn on the assumption that the meeting could only be called under section 37, requiring a requisition from a majority of the rate-payers.

Held, that no such requisition was necessary, that the Trustees could call the meeting of their own motion, and that, whether the requisition was signed by a majority of rate-payers or not, the action of the meeting was legal and valid.

THIS matter came before the Court on a certiorari and a motion to set aside an assessment made for the support of a public school, on the grounds first, that the parties calling the meeting of the rate-payers at which the assessment was voted were not trustees; secondly, that they had not signed the authority; thirdly, that the amount assessed had never been voted by an annual meeting or a special meeting of the rate-payers properly called; fourthly, that the meeting had not been called on the requisition of a majority of the rate-payers; fifthly, that the requisition had not been signed in time to allow five days notice to be given; sixthly, that some of the requisitionists had signed the requisition on the day when the rate was voted, and some afterwards; seventhly, that the meeting had not been called by notice, posted in three public places five days previous to the meeting; eighthly, because the assessment was made for a larger sum than that voted; ninthly, that the warrant had been illegally and improperly issued.

The case was argued by *Rigby, Q. C.*, to make absolute the rule, and J. S. D. Thompson *contra*. The affidavits in support of the motion and those in reply were voluminous and conflicting.

Rigby opens.—Upon the face of the papers there is sufficient to show that the meeting was irregular, even admitting that the affidavits are very contradictory. The affidavits and statements contained in them going to show the advantage of sustaining the assessment have no relevancy, and should not be here. They might possibly have been answered.

There are sixty names of rate-payers on the assessment roll, leaving out the poll tax payers, who admittedly are not rate-payers, but including those over age. The requisition has thirty names altogether, including those over age.

The trustees themselves have undertaken upon the rate roll to erase the names of those that they say are over age, and give evidence of that. There are ten over age, one marked as not able to pay, and two as dead. This is on the rate roll. Now there is nothing in the law to say that a person not able to pay is not a rate-payer, *ipso facto*. Nor is there anything to show that a person over age is not a rate-payer. *R. S.*, cap. 32, sec. 65. That statute enables them to be exempted upon making application, of which there is no evidence here. Even if they had done so they could not be disfranchised. The statute defines rate-payers as persons "rated upon the county rate-roll." Therefore, whatever the fact as to their age, they are rate-payers within the Act. They would not cease to be rate-payers within the meaning of that section, and could not be disfranchised even if erased upon application, and so not compelled actually to pay the tax. Although not in that case liable to pay, they are entitled to vote. They cannot be disfranchised without express legislation. The rate-roll must be taken as returned to the Trustees. Another is struck off because he is not able to pay. It is not shown when they struck off these names, and they have not given evidence to show that they were over age, except that, in connection with other matters, namely, the jury lists, some of these persons claimed the exemption. They strike off two of them as being dead, one of whom was alive at the date of the meeting. Even as to the other man, who was actually dead, can the *trustees* undertake to strike him off? Allowing the one dead man, the roll is fifty nine, and of these it would require thirty to make a majority. There are only thirty names on the requisition, one of whom, Dennis DeLucré, is not on the rate roll. The evidence in regard to him is uncontradicted.

(YOUNG, C. J.—How does it appear that these names erased were erased by the trustees? There is no proof of that.) (DESBARRES, J.—I should say that those erasures were made by the Clerk of the Peace, and that the roll, with the erasures, is the roll as sent by him.

Rigby.—We swear that these persons so erased are rate-payers. That is conclusive, because it is not contradicted. They return a certain list as a list of rate-payers. Among the thirty who signed the requisition, there are persons over age.

Thompson, contra.—The whole section, except three persons, have paid the assessment. One of the three is Jeffry Gorman, who has induced two others to make affidavits with him. Mr. Darragh's amount is $6.00, and another $1.00. The whole assessment is attacked for this, and it comes to whether there should not be one more signature to the requisition. Under these circumstances the trustees are in a position to ask for a liberal construction of the law as against a pure technicality. The only two parties moving against this are two persons whose united taxes amount to twelve dollars. The regularity of the whole assessment is attacked on account of those two. (*Rigby* refers to warrant, showing that some twenty have objected to paying.) That proves nothing. They may be mere delinquents, or may have paid the moment the warrant was issued.

In the first place, no requisition was necessary for the calling of the meeting. The trustees had power to convene that meeting to provide money for the school, without requisition, and the requisition is only required to compel reluctant Trustees; sec. 13; sec. 34, sub-section 8. The question is, was this a necessary purpose? It certainly was, as the duty is cast upon the trustees of keeping up the school. The Trustees may call the meeting if deemed requisite, and can be compelled to do so by requisition.

Persons over sixty years of age are disfranchised, provided they are not assessed for over $500. We allege both facts. They are only to make the affidavit if required, *i. e.*, if the fact of their being over age is challenged. Mr. Rigby would have it that these persons can go to a meeting and vote and assess other people, and leave it to the last moment to say whether they will claim the exemption or not.

Section 54 provides for the imposition of a poll-tax, and section 55 points out when the parties paying the poll-tax shall be entitled to vote under certain conditions. There is clear evidence that nine or ten were over age, and assessed for sums

under $500. The fact is established that at the meeting there was a large majority of the rate-payers of the section, and the vote was unanimous.

Sec. 54 gives a remedy which would have been available for these objecting parties, if they had not desired to defeat the whole law. I think the Court would therefore be loath to interfere to disturb the whole rate where the parties dissatisfied did not avail themselves of that remedy. *Rex* v. *Hammond*, Andrews, 343.

(MCDONALD, J.—Did not the Court decide so in *McGregor* v. *Patterson*?)

A further objection is that this rule is not taken in proper time; R. S., cap. 21, sec. 67. That section is directly invoked by a clause in the Education Act.

The name opposite which is, "unable to pay," is properly struck off. (DESBARRES, J., remarks on the peculiarity of the entry, "not being able to pay, being sick.") There may be other reasons. Sec. 36 of the Act provides for exemption, on the ground of inability to pay. (YOUNG, C. J.—Sub-section 8 is new and has never been construed by us.) It was introduced for the very purpose of enabling the Trustees to call a meeting and make an assessment.

Cites *McGregor* v. *Patterson*, 1 Oldright, 214, as to the liberal construction to be given to the Act, and upon the question of appeal.

Rigby, Q. C., in reply.—We are not here to argue the expediency of quashing the assessment, but the mere abstract question whether it has been legally levied.

The warrant shows that a large number of rate-payers, (fourteen,) object to paying the assessment, in addition to a number who, although objecting to it, have paid it for the sake of peace.

This is not an application to set the certiorari aside, and it can only be attacked by independent application. We come here now to discuss *the rate*, whether it should be set aside, and not whether the certiorari should be set aside. I contend that the Court of Appeal under that Act has no authority to go into the whole question of the assessment. They can only go into the merits of individual cases; and therefore it would be

absurd that one who objects to the whole assessment should appeal. These two persons might represent any number of objectors.

Now it is argued that whether this is right or wrong, under sub-section 8 of sec. 34, the Trustees could call a meeting without a requisition. The question is, did they call a meeting under that section. The evidence is that they did not, but that the meeting was called under the other section. It is not pretended that this meeting was called under sec. 34, sub-section 8. I contend that for the purpose of voting money the meeting is to be called in a special way. Sec. 37 provides for it, and shews that the object of the meeting is to be named in the notice. In the other section, 34, sub-section 8, the Trustees are not obliged to mention the purpose of the meeting; but when the object is to vote money it must be set out in the notice. See section 34, sub-section 8.

JAMES, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This is a motion to make absolute a rule *nisi* to set aside an assessment for the support of a public school at Herring Cove, in the County of Halifax, upon several grounds, the principal one being that the meeting of the section at which the resolution voting the money was passed was not called upon the requisition of a majority of the rate-payers of the section, signed a sufficient time before said meeting to enable five days notice thereof to be given. The other objections to the rate need not be particularized. It is sufficient to say that the Court are unanimously of opinion that they are sufficiently met and disposed of by the affidavits produced in opposition to the rule.

Section 37 of the chapter on Public Instruction, (R. S., cap. 32,) provides that, "upon the requisition of the majority of the rate-payers of any section, the trustees shall convene a special meeting of rate-payers for the purpose of voting money or adding to any amount previously voted for any purpose authorized by this chapter; notice of which shall be given by the trustees, as provided in the case of the annual meeting, and such notice shall express the object of such meeting."

The counsel for the applicants relied on affidavits purporting to shew, among other defects in the proceedings, that the

requisitionists were not a majority of the rate-payers, and these were met by numerous affidavits to shew, among other things, that the requisition contained the names of the majority of those whose names ought to be on the roll, after striking out the names of parties supposed not to be rateable.

The Court are not called to decide this only remaining question of fact, in the view we take of the law. Prior to the passing of the 4th series of the Revised Statutes, which came into operation in May, 1874, the clause above recited, making it compulsory on trustees to call a meeting on the requisition of the majority of the rate-payers, had, in its present form, no place in our legislation. We first find it in the place where it now stands as cited, viz., R. S., 4th Series, p. 174, section 37, Previously all moneys were voted for school purposes by meetings otherwise called, *i. e.*, either the annual meeting or a special meeting called by the trustees at their own discretion; (see R. S., 3rd Series, p. 213, sec. 23,) or by the inspector on their failing to perform their duty; (Acts of 1865, p. 72, sec. 13.) This statute contained several enactments to meet the contingencies of failures of duty on the part of the trustees or the people. Among them was a clause as follows; chap. 72, sec. 13; "Trustees may call special meetings of the section to fill vacancies in the Board of Trustees, and to transact any necessary business *other than that required to be done at the annual meeting.*" I can find no other enactment in that act or the chapter it was intended to amend, limiting the power of voting money to the annual meeting. But the powers of a meeting so called were enlarged by the removal of this limitation, by section 34, R. S., 4th Series, p. 173, sub-section 8, which authorizes the trustees "to call a special meeting of the section, due notice being given by means of the school or otherwise for the purpose of filling any extraordinary vacancy, &c., *and for any other necessary purpose;*" thus indicating a clear intention in the Legislature to give the trustees power to call a meeting at any time and for any purpose.

The power thus given to the trustees is obviously a necessary one, for there is nothing more probable, especially in sparsely settled districts, than the failure of a meeting duly called, for the want of a sufficient attendance; or there may be a sufficient attendance, but it may be considered prudent to

postpone the decision of the meeting, as was done in the present instance. Various things may happen to prevent an appropriation of funds for school purposes at the time, and make a subsequent meeting of the rate-payers necessary for that purpose,—such for instance as the destruction of the school-house by fire. In such cases the power to call a meeting whenever necessary should be vested in somebody, and to whom would this discretion more naturally be entrusted than to the trustees to whom from the first the power of calling such meetings had been entrusted by the law? What then was the object of inserting in the statute the section relied on? It was, I think, obviously intended, not to take away the power of the trustees to call a meeting when they considered it necessary, but to compel them to do so against their will on the requisition of a majority of the rate-payers.

Such is not at all the present case. At the annual meeting the money was not voted, on account of a small attendance, and the meeting instructed the trustees to call another meeting for the purpose. This they did, but they acted under the mistaken impression that sec. 37 was applicable. They themselves were active in getting up the requisition to themselves to call the meeting, and they are the parties appearing before us by counsel to sustain it.

I am of opinion that both parties misconceived the meaning of the law, which I conceive to be that the trustees may call a meeting when they please, and must call it when duly required to do so under section 37. I am satisfied that sufficient notice of the meeting was given, that the action of the meeting was legal and valid, and that the rule *nisi* must be discharged.

In conclusion, I think it proper to remark that sub-section 8 of section 34, which gives trustees power to call a meeting for the purpose of voting money, contains no directions as to the time and mode of advertising the meeting, except the words, "by means of the school or otherwise." I consider this as being quite insufficient to secure fair and full notice being given, and without such ample notice the power given to trustees to call such a meeting is very likely to be abused by parties having special interests of their own to advance. The clause should certainly be amended by the Legislature.

I think the rule should be discharged.

SIR WILLIAM YOUNG, C. J.—The numerous affidavits and the contradictions in this case reveal a state of feeling much to be lamented, and which it is the duty of this Court, and of all right thinking persons, if possible, to allay. To go through these affidavits and to endeavor to reconcile these contradictions would be a vain attempt. The law also as to the holding of school meetings is by no means clear or satisfactory, and seems to have been mistaken by both parties, which has led to an accumulation of costs far beyond the amount that is at stake, and sure to aggravate the irritation that has arisen. By the 72nd section of the School Act, *R. S.*, chap. 32, the annual school meeting, deciding, among other things, the amount to be raised in the section, is to be convened by notices posted five days previously in three public places. By section 37 a special meeting shall be convened by the trustees upon the requisition of the majority of the rate-payers, for the purpose of voting money, to be called in the same way as the annual meeting. The raising of money in both cases being thus carefully guarded, it is contended that it may be raised under section 34, sub-section 8, at a special meeting called by the trustees, "due notice being given by means of the school or otherwise." What does this mean? Is the notice to be oral or in writing, put up in the school or announced to the pupils. When the section proceeds to say, that the power of such a meeting is to extend to "any necessary purpose," that is the full power of the annual meeting,—the sections of the Act can hardly be said to be consistent with each other. The assessment of the minority,—in this case, as it is said, of a small minority,—is defended upon this 34th section, but the trustees themselves relied on the 37th section, and brought in a host of affidavits to show that they had complied with it. I incline to think that they have proved that, though it is a hard thing for this Court to decide, where there are respectable men on both sides, which of the two are to be believed. Upon a review of the whole case, and as the wisest and best mode of disposing it, I am of opinion that the rule *nisi* for setting aside the assessment should be discharged, but without costs.

MCDONALD, J.—In ascertaining the intention of the Legislature I think it is important that we should consider the order of the different sections in which the duties and powers

of trustees are prescribed. Section 30, cap. 32, *R. S.*, charges them with the duty of meeting and organizing as soon as practicable after their appointment, of holding school property, fixing sites of school houses, and providing school accommodation, &c. Section 31 authorizes them to dispose of school lands and purchase or accept of other lands in return. Sec. 34 requires them to give notice of the opening of schools, to visit schools, expel or suspend pupils, adopt means for the preservation of the health of the school, and, (by sub-section 8,) "to call a special meeting of the section, *due notice being given by means of the school or otherwise*, for the purpose of filling up any extraordinary vacancy occurring in the Board of Trustees, *and for any other necessary purpose.*" The Legislature contemplated that the trustees should be an acting body, having large discretionary powers, and it is their duty, under a penalty, to discharge the obligations imposed by the Act. Without giving that power the statute would not, in my opinion, be sufficient to accomplish the intended object. Sub-section 8 of sec. 34, seems to me to make it their *duty* to call a special meeting for any necessary purpose, and in order to discharge them from the obligation of calling a meeting to provide funds for the support of a school, they should be prepared to show that such was not a "necessary purpose." We are told that a special meeting for such purpose is not valid unless the trustees be first required to call it by a requisition signed by a majority of the rate-payers. Why is that? Are not due notices sufficient in such cases? Is it not "a necessary purpose" to provide money for the support of schools? It is true that the annual meetings, at which moneys are usually voted are fixed by statute, but only to require the trustees to give notices of such meetings, and no requisition of rate-payers is first required to make the money votes there passed valid, though without the notices prescribed such votes would not be valid. Sec. 37, relied upon by the parties who caused this certiorari to be issued, provides that, upon the requisition of a majority of the ratepayers of any section, the trustees *shall* convene a special meeting of the rate-payers for the purpose of voting money or adding to any amount previously voted, &c. But if the trustees voluntarily call a meeting for such purpose, and give due notice thereof, where is the necessity for such a requisi-

tion; and if the statute intended, as I think it did, that the trustees should be the actors in the management of schools and in securing funds for their support, why should a clause be inserted in the act by which their efficiency would be undoubtedly impaired, as it would be if the contention of the parties moving in this case be true? I take it that such is not the spirit any more than it is the letter of the statute, but that section 37 was passed with a view to provide a remedy when the trustees failed to discharge a duty prescribed in the previous sections, to cause them to act when they proved to be inactive, to compel them to call meetings to provide funds for the support of schools, which is certainly a necessary purpose, when, either through an erroneous exercise of their discretion or unwillingness to pay their own proportion of the rates,—instances of which are too numerous,—or through any other cause, the necessary meetings were not called to provide the required funds.

It may be said that for the purpose of holding meetings at which money can be voted, 'notice by means of the school or otherwise," should not be deemed due notice. But the Legislature thought fit to call it "due notice" for necessary purposes. If it is due notice for one necessary purpose, why not for another? The Legislature did not distinguish between one necessary purpose and another, and I do not think that, in the face of the statute, we ought to do so. But I am convinced that a notice "by means of the school," for instance one posted up in a school-house during school hours, and an announcement by the teacher in school that a meeting should be held at a fixed time, with a request that the pupils would communicate the fact to their parents, would come to the knowledge of all the ratepayers much earlier and more certainly than if such notice were posted in three of the most public places in the section;—because then it would be the duty of the pupils to communicate the fact to the parents. Notices posted up in three public places in the district would probably be read by those at whose residences they were posted, but those who remained at home, away from the public places, would not see or read them, and their knowledge of the fact of such a meeting being about to be held would depend entirely upon hearsay. Hearsay information would,

in my opinion, be much more likely to be communicated to the ratepayers by "means of the school," than in the other manner mentioned. In this case, however, sufficient notices are proved to have been posted up in the proper places, as I think.

It should not be forgotten that the meeting in question was an adjourned one. The annual meeting was called, held and adjourned to a future day not named. It was not contended, and cannot be, that a requisition was necessary to enable the annual meeting to vote funds, and what could be done on that occasion could as well be done at any time to which it was adjourned. The day of adjournment not having been fixed at the time, it was the duty of the trustees to fix it and notify the ratepayers. Surely a requisition was not necessary for that purpose, and I think that for that reason alone, the certiorari cannot stand.

But there is another view of the case which I think is fatal to the certiorari, and that is that it was not issued in accordance with the law which governs such cases. The act respecting public instruction, sec. 54, provides that moneys voted, "in default of payment of the same," shall be collected under and by virtue of the chapter of the Revised Statutes of County Assessment. That chapter gives a remedy to the party aggrieved by appeal to the Sessions, but provides, (by sec. 62, chapter 21,) that such appeal shall not delay the collection or recovery of the sum assessed upon the appellant. The policy of the statute is to enforce the immediate payment of the money assessed in both cases, giving the appellant the right to have the money restored to him if he be improperly assessed. But in this case that policy and the plain meaning of the law are defeated, when, by issuing a writ of certiorari, the collection of the money is stopped by a few in number, who appear to be the moving parties. When the Legislature said that an appeal should not delay the collection of the sum assessed upon the appellant, was it intended that such collection could be otherwise delayed by adopting a remedy different from that which is given by the Act? The remedy by removing cases of assessment to this court by certiorari is given by cap. 21, sec. 67, but not at the time or in the manner in which it is sought here. For that chapter, after

providing for the remedy by appeal, says that "no certiorari to remove rates or orders, or other proceedings of the sessions touching rates, shall be granted, but upon motion in the first week of the next term in the County after the time of appeal has expired, and upon it being made to appear on affidavit that the merits of the question upon such appeal and orders, will, by such removal, come properly in judgment;" &c. The meeting in question was held, and the money voted on the 13th day of October, 1875, but the writ of certiorari was not issued till the 8th day of April, 1876, the Court of Sessions and both the sittings and a term of this Court having been held in the meantime. No motion was made for leave of the Court to issue it, and no such leave was obtained. To my mind it is clear that the parties who instituted these proceedings, should, if aggrieved, have resorted to the remedy of appeal given by section 61, chapter 21, Revised Statutes, "without prejudice to the whole or any part of the assessment." This view of the law, if I recollect aright, was taken by this Court in the case of a certiorari *in re* Section 42, County of Antigonish, some years ago, but the case is not reported. It is, I think, in accord with the intention of the Legislature, when it was enacted that the remedy provided should not delay the collection of the money voted, that no certiorari should be allowed to remove "rates or orders, or other proceedings of the Sessions touching rates," except under circumstances which do not exist in this case as already pointed out.

Holding the views here expressed, I do not think it necessary to refer to the questions of fact raised by the affidavits, which are very contradictory, any further than to say that, in my opinion, the affidavits in support of the certiorari are fully and satisfactorily answered by those in support of the assessment.

McDOUGALL *v.* McDONALD.

DEFENDANT hired to plaintiff for two dollars a wharf at Whycocomagh, for the purpose of shipping cattle. The wharf was in bad repair; two of the stringers were objectionable, one of them being rotten, which, however, could not be seen until it was broken. Plaintiff drove over the wharf eighteen or twenty cattle, a much larger number than had usually been driven over it, and defendant said he would not, if present, have allowed such a number to go over at once. The cattle becoming frightened on the wharf ran back to the shore, and in doing so broke the imperfect span of the wharf. The case having been properly left to the jury, they found that the injury was not occasioned through any insufficiency in the wharf, but by the negligence of the plaintiff in using the wharf as he did, and they found for defendant.

Rule refused, SMITH and JAMES, J J., dissenting.

THIS action was brought to recover damages caused by alleged defects in the defendant's wharf, over which plaintiff's cattle were driven. It was tried by McDONALD, J., at Port Hood, C. B., and a verdict found for the defendant. The matter came before the Court on a rule under the statute to set aside the verdict, which was argued before three of the Judges, who recommended a re-argument before the full Court. The cause came on for argument this term before YOUNG, C. J., and DESBARRES, McDONALD, SMITH and JAMES, J J.

Bligh, for rule.—Nearly all the law in regard to negligence of this kind refers to railways. I have found one or two cases in reference to wharves. We were met before by the view that the verdict of the jury was conclusive. That is only when there is a question of fact. There was a defect in the wharf; there is no conflict of evidence on that point, and the accident was due to that defect. *Sherman & Redfield on Negligence*, sec. 498; *Ib.*, sec. 585. *Saunders on Negligence*, p. 81; *12 Gray*, 494.

The defendant was bound to give the plaintiff notice of the condition of the wharf. The wharf was not fit for the purpose for which it was intended.

SMITH, J.—Was not the risk of the cattle getting frightened and running, the plaintiff's risk?

Geo. Johnson, contra.—This was a case for the jury, and their verdict as to negligence should be conclusive, there being no misdirection complained of; *Taylor on Evidence*, (3rd Ed.) 47; *2 A. & E.*, 260; *Saunders on Negligence*, 13.

The next point is that this is a case of unskilfulness on the part of plaintiff; *3 Taunton*, 217. The next point is remote-

ness,—connected with the last; *7 Wallace*, 44. Here the plaintiff's action in backing up the cattle, herding them upon the bridge, was the cause of the accident.

There was no contract between plaintiff and defendant to make defendant liable here. The defendant simply agreed to let the cattle pass down to the vessel, which they did safely; he was not liable for what happened on account of the cattle crowding back again; *1 Hurlst. & Colt.*, 633. There was no general contract for the safety of the wharf.

The next point is that if the evidence will justify an inference inconsistent with defendant's negligence, as well as an inference of negligence on his part, the plaintiff cannot recover; *L. R., 6 Q. B.* If the fact of negligence is doubtful the plaintiff cannot recover.

The defendant is only bound to keep his premises in a reasonably safe condition, similar to other like premises; *L. R., 1 C. P.*, 288. He is not bound to provide against any unnecessarily severe strain; *11 Exch.*, 781. He is not liable for effects produced by animals in an uncontrolled state; *Wharton on Negligence*, sec. 984. There was contributory negligence on the part of plaintiff; *3 M. & W.*, 244, recognized in *10 M. & W.*, 548, explained by Lord CAMPBELL in *1 El. & Bl.*, 595. In this case the plaintiff might, by the exercise of ordinary care, as laid down in the case cited from *10 M. & W.*, have prevented the accident. Cites *35 L. T. R., N. S.*, 693.

Meagher, follows.—The condition of this wharf was as well known to plaintiff as to defendant, and the contract, it must be remembered, was made with a view to its actual condition, known to one party as well as to the other. We have witnesses here, (plaintiff's,) stating that they believed the wharf to be safe; it is therefore fair to assume that defendant believed the same, and that therefore he was not guilty of negligence, the defects in the wharf, if any, not being apparent upon external examination.

YOUNG, C. J.—The mere external appearance of soundness is not sufficient.

Meagher.—The very fact that plaintiff's evidence was not sufficient to satisfy the whole Bench in the previous argument on the point of negligence, is an argument against disturbing

the verdict. The plaintiff was guilty of neglect in not keeping men or boys on the wharf to keep the cattle down to the side of the vessel, where they would have been safe. If they could not keep them there, then this was an accident merely.

The Court must remember that this contract was made with reference to the actual condition and character of this wharf. In *Casey* v. *Archibald*, Thomson Rep., 4, the putting of three persons in a single carriage, when, on the journey, the horse sickened and died, was held a misuser.

JAMES, J.—By the jury.

Meagher.—The verdict was sustained. The defendant here swears that he was not in the habit of putting more than fourteen or fifteen head of cattle on the wharf at one time, and that there were too many cattle on at the time of this mishap, more than he would have allowed if he had been present. Cites *Saunders*, 12, 13, 14 and 22.

The fact referred to by plaintiff's counsel in opening, that defendant was in the habit of cautioning people to use the wharf carefully, does not prove that he knew the wharf to be defective; it was a mere caution to people using his wharf to use it carefully. *2 Foster & Finlayson*, 691.

McDonald, Q. C., in reply.—There is not a particle of evidence here to sustain this verdict. It is against law and against evidence, in the strongest sense of the word. Plaintiff had forty head of cattle to ship at that wharf, where he had shipped cattle before, twenty or thirty head at a time, to the knowledge of defendant, and for which defendant took pay. Defendant says the wharf was repaired two years before, but there is no evidence that he examined the wharf during those years. The fact that he neglected the proper examination makes him liable, if there was an original defect; *Fisher's Dig.*, 6069; *3 L. T. R.*, 549.

There were fourteen head of cattle on the bridge when it broke down; they would weigh, at eight cwt. apiece, about five tons; the bridge had four stringers, three and a half feet apart, seven or eight inches through at the small end, and only sixteen feet long; and if those stringers had been sound, they should have been abundantly sufficient to carry the weight of those cattle, even with the effect of that weight increased

fifty per cent. by the motion of the cattle. There were really only thirteen head of cattle on the bridge when it broke. Only twenty, at the outside, were taken down the wharf at the time, two were shipped, and five had passed off the bridge before it broke, leaving only thirteen on the bridge when it broke.

The plaintiff here exercised care, keeping twenty of his forty head of cattle off the wharf, though he says he had shipped twenty and thirty head at a time on the same wharf previously. We have it sworn to that one of the four stringers was rotten inside, and another rotten outside. Defendant does not contradict that statement.

The Judge should have instructed the jury that there was no attempt to prove contributory negligence. The negligence of defendant was proved by plaintiff and not denied. Cites *36 L. T. R., N. S.*, 535.

There is no evidence here that plaintiff knew the condition of the wharf.

DESBARRES, J., now, (March 12th,) delivered the judgment of the Court:—

This was an action brought by plaintiff to recover damages from defendant for injuries done to himself and a lot of cattle he was in the act of shipping from a wharf at Whycocomagh, hired to him by defendant for that purpose, which he alleges was at the time unsafe and insufficient to bear the weight of said cattle; in consequence of which the wharf, on the cattle being driven thereon, broke down and occasioned the injuries complained of. The cause was tried by Mr. Justice McDONALD, at Port Hood, in June, 1876, who told the jury that, the agreement having been proved, the defendant was liable to the plaintiff for any damages shown to have resulted from the wharf being insufficient for the purpose for which it was hired, and that the sufficiency or insufficiency of it therefor was a question for them. He also told them that the plaintiff was bound to use the wharf with the care with which a person of ordinary prudence would use his own, and if they thought that the wharf was insufficient for the purpose for which it was hired, and the loss complained of had occurred in consequence of the improper or negligent use of it by the plaintiff or his servants,

they should find for the defendant; but if it was not sufficient for the purpose, and the loss was not the result of the negligence, or improper use of it by the plaintiff, they should find in his favor for damages sufficient to cover the injury he had sustained. Under the instructions thus given to them, which I think were right, the jury found a verdict for the defendant, and we are now to decide whether, upon the facts before them, they were warranted in so finding. The sufficiency or insufficiency of the wharf for the shipment of plaintiff's cattle, and the question whether it was rightly or negligently used by the plaintiff for that purpose, were subjects which were submitted to and occupied the attention of the jury; and their decision in a case like this, falling within their legitimate functions, ought not, in my view, to be interfered with without very strong evidence to show that they had arrived at a wrong conclusion, which, after carefully reading the evidence, I have failed to discover. It would be unreasonable to suppose that in hiring his wharf to the plaintiff for the small remuneration of two dollars, the defendant ever intended to hold out, or that the plaintiff himself considered he did hold out, the assurance that it was strong enough to sustain the weight of as large a number of cattle as the plaintiff might think fit to put upon it. The defendant knew well, and the plaintiff must have known as well as himself, that, constructed as the wharf was, it was only capable of sustaining a small number of cattle at a time, and the defendant must therefore have expected that, in shipping his cattle, the plaintiff would place no greater number upon it than such as the wharf could reasonably be expected to bear, or than had been usually placed upon it on other similar occasions. This wharf appears to have been built on wooden piles, with stringers one foot in diameter at the butt, and seven or eight inches at the small ends, these stringers being twenty feet in length and covered with poles of the ordinary size used in the country for fence poles. It is obvious that a wharf of such material and construction as this was not well adapted for the shipment of cattle in large numbers, or of heavy goods, a fact of which the plaintiff could not have been ignorant; and therefore greater precaution and care were necessary to be observed by plaintiff in shipping his cattle than would be

required on a wharf constructed of stronger and more durable materials. The defendant testified that twelve or fourteen head of cattle was the usual number placed at any time on the wharf for shipment. The plaintiff, it appears, had between eighteen and twenty head of cattle on the wharf when it broke down, which defendant says was a greater number than he would have allowed to go upon it if he had been present, for fear of injuring the wharf as well as the cattle. The jury, by their verdict have found that the injury complained of was not occasioned through any insufficiency in the wharf, but resulted from want of care and negligence on the part of the plaintiff and his servants in using it in the manner they did. It was proved by Carmichael, the master of the vessel lying there, that the cattle got frightened and broke through a span of the wharf when running back to get ashore. That was an act more likely than any other to produce, and which no doubt did produce the very accident that ensued. For these reasons I think the verdict ought to be retained, and that the rule for setting it aside must be discharged.

SIR WILLIAM YOUNG, C. J.—The rule for a new trial in this case was argued before the full Court in the present term, there having been a division of opinion among the Judges who heard the first argument. One of the written judgments then prepared has just been read, and, avoiding the ground which has been already trodden, I shall content myself with stating my own view in a few words. Passing over the charges in the declaration of which there was no proof, the main inquiry is whether the defendant was guilty of negligence in furnishing for pay a shipping wharf unfit for its purpose, and therefore occasioning the loss the plaintiff sustained. That two of the stringers were open to objection was clear. Both were chipped at top; one seemed to be sound, the other rotten about the heart, which could not be seen till it was broken; it was partly rotten outside. There were four stringers, eight inches at the small end, and a foot at the butt. Only two of them broke. The wharf was 150 to 200 feet long, and the broken part had been repaired two years before. Now, this is a wharf which would not be endured in Halifax, nor was it fitted, perhaps, for the reception or shipping of valuable and heavy goods; but was it a wharf fit,—reasonably fit,—for the

shipping of cattle, and the trade of the place where it was situated. Negligence is a relative term, having a view to all the circumstances of the case; *Campbell on Negligence*, 218. In considering it we are to be guided by the ordinary course of business and of human affairs, by what a reasonable man would do or refuse to do. It was a knowledge of the local circumstances that probably led the jury, upon the question being fairly put to them to find that the wharf was sufficient for the purpose for which it was hired. But they may have been influenced also by the extraordinary circumstances which occasioned the breakage. A larger number of cattle than usual went upon the wharf at one time, eighteen or twenty in all, and were driven on by the servants of the plaintiff. The master of the vessel says he sang out not to drive so many on, but this the men did not hear. The master then says that the cattle got frightened, and running back broke through in passing over the span. The Judge's charge was found fault with on the argument, but as we have just heard it read, it was entirely unobjectionable, and the verdict, I think, must be sustained, however much we must regret the peril to which the plaintiff was subjected, and his pecuniary loss.

McDONALD, J., concurred.

SMITH and JAMES, J J., dissented.

FULLERTON *v.* IBBITSON ET AL.

DEFENDANTS, desiring to borrow money on mortgage, took the plaintiff, who was the solicitor of the mortgagee, upon the land offered as security, and pointed out the boundaries of the land. Plaintiff drew up a mortgage in which the land was described as that on which defendants resided, but the boundaries given were shown by parol evidence not to include the portion on which they resided, although it was clearly the intention of all parties that this portion should be included in the mortgage. Plaintiff having taken an assignment of the mortgage, foreclosed it, and bought in the property at the Sheriff's sale, the description in the Sheriff's deed following that in the mortgage. Plaintiff then brought action of ejectment, and defendants, as to this portion, pleaded that Plaintiff had no title.

Held by JAMES, J., that defendants were not estopped from saying that the land in question was not included in the mortgage, but that the verdict for Plaintiff must be sustained, as it was the clear intention to include the portion on which defendants resided, and the ambiguity had been cleared up by parol evidence; by YOUNG, C. J., DESBARRES, and SMITH, J J., that the defendant was estopped by his representation that the whole of the land, including the part in question, was to be comprised in the mortgage.

This was an action of ejectment, brought under the following circumstances. The defendants, seeking to borrow money on mortgage, took the plaintiff, who was the solicitor of

Tupper, the mortgagee, and who afterwards took an assignment of the mortgage, upon the land in question, shewed their deed as a muniment of title to the land, and pointed out the land as part of the security to be included in the mortgage. The plaintiff took a mortgage, the description in which did not cover the land in question. He foreclosed the mortgage, bought in the premises at Sheriff's sale, and then brought this action to eject the defendants from this land. The defendants pleaded as to the part in question that the plaintiff had no title. A verdict was taken for plaintiff by consent, subject to the opinion of the Court upon the point whether the defendants were estopped from setting up this defence. A rule *nisi* was granted to set the verdict aside, on the grounds of the improper rejection of evidence, and on the ground, (as above mentioned,) taken at the trial.

The rule was argued December 28, 1877, before YOUNG, C. J. and DESBARRES, SMITH, and JAMES, J J.

Ouseley, Q. C., in support of rule.—We offered as evidence a certified copy of the Ibbitson Grant with plan annexed, which was rejected, to shew that, at the time of the making of the mortgage, the defendants did not own the *locus*. The plaintiff has been guilty of *laches;* the mortgage was of long standing, and it is to be assumed that the title of defendants was searched long ago; it must at all events have been searched before the sale under the mortgage. The plaintiff should have proceeded in Equity to reform his mortgage, or get what other remedy was open to him.

Meagher, contra.—There is uncontradicted evidence here that the defendants took the plaintiff upon the *locus*, told him it was their property, that they had occupied it twenty-five or thirty years, and that it was part of the property to be included in the mortgage, which was to raise money to be expended on the dwelling house on the *locus*. There is such ambiguity in the description in the mortgage as to let in parol evidence to show what it covered. The defendants are estopped from setting up this defence against the plaintiff. *Bigelow on Estoppel*, (2nd ed.) 533; *12 Metcalf*, 494. The pointing out of the land by defendant may be considered as fixing conventional boundaries. In *Cole on Ejectment*, 221, it is laid

down that an estoppel runs with the land and forms part of the title. See *Doe* v. *Oliver*, Smith's L. C.

Johnstone, Q. C., follows.—The Court must be controlled here by the first general description in the mortgage, which includes the land in question. This Court can rectify the subsequent enlarged description, where it appears defective; *Shepherd's Touchstone*, 99, 246–7. As to estoppel, see *Freeman* v. *Cole*, 2 Exch., 654. The Court should set aside the plea here, as setting up the defendants' own fraud. In the construing of deeds, the intention of the parties is the guide. *Broom's Leg. Max.*, 630. All we ask is that the defendant himself shall not be allowed to set up this plea. This is not the case of an innocent party. (YOUNG, C. J.—It is fundamental that plaintiff must recover upon his own title.) Yes, where there is a plea; but he had no right to plead that plea, being estopped. *1 T. R.*, 701; *Cowper*, 600; *Brightley's Digest*, 1514. *Stephens' Digest of Evidence*, 105; *16 C. B., N. S.*, 81; *1 Cr. & Jar.*, 90.

The misdiscription is a mere clerical error. If it had stopped at the end of the first description it would have been right enough. It is clearly a case of *falsa demonstratio*. The party here did not reside on the southern part but on the northern part, (the part not included strictly in the desciption). *2 Fisher*, 3538; *2 McQueen's House of Lords*, 829; *Ahern* v. *Huntingdon*, (unreported); *Nelson* v. *Connors*, 1 Oldright, 406, which was converted into an Equity suit.

If the Court simply says defendant shall not be allowed to plead that plea, then this case goes undefended. We take out our *habere facias* at our peril.

Rigby, Q. C., in reply.—Mr. Fullerton had all the relief he would have got in a Court of law or Equity in his previous proceedings. Not content with that, he brings ejectment. *Cole*, 287. A mere equitable title is not sufficient. *R. S.*, p. 491, sec. 296; *Bigelow on Estoppel*, (2nd edition,) 431. The heading of the chapter is estoppel by conduct or equitable estoppel. The plaintiff has not put in any equitable replication. *Bigelow*, 603 and 604.

It would be inconsistent with our system to allow the plaintiff to recover on the ground of estoppel, because he had no notice. Defendant has been brought into Court to contest his legal title.

This is not the case of a conventional boundary at all. The question of latent ambiguity does not arise here. There is no ambiguity or uncertainty. If they claim that there was an ambiguity, then our evidence should have been received, (*i. e.*, the grant that was rejected,) to explain the ambiguity.

The COURT, now, (March 12th, 1878,) delivered judgment:—

JAMES, J.—This is an action of ejectment brought by the assignee of a mortgage against the mortgagor; verdict for plaintiff, subject to the opinion of the Court.

The defence was to a part of the premises claimed, which it was contended was not included in the description of the mortgage, which was as follows:—

"All that lot of land on which the said Thomas Ibbitson and James B. Ibbitson now reside, situate at Shinimicas, in the County aforesaid, bounded on the one side line by lands formerly owned by John Ibbitson, and on the opposite side line by the main road leading from Amherst to Goose River, and by the south boundary line of land granted to the late W. Ibbitson, Senior, and on the end lines by lands conveyed to James and Henry Ibbitson, containing one hundred acres more or less."

The lands had been foreclosed under the mortgage and purchased by the plaintiff, the description in the Sheriff's deed corresponding with that in the mortgage.

It is beyond dispute that the land in controversy is not included in the boundaries given in the description, being separated from the part within the boundaries by the Goose River road mentioned in the description. It is also beyond dispute that the part of the property included in the boundaries given was not that portion of it on which the defendant resided when he gave the mortgage. It appears from the evidence that the defendant's improvements were on both sides of the road, but his residence was on the land north of the road, which contained about thirty acres; and is represented in the evidence to be worth a rental of one hundred dollars a year, being, therefore, an important part, if it be a part, of the mortgaged premises. I presume, from the evidence, that the land sold under the foreclosure was insufficient to pay the

It appears from the evidence of the plaintiff, which no attempt was made to contradict or explain, that when the defendant and his brother, and joint mortgagor, James Ibbitson, (since deceased,) were negotiating with the plaintiff for the loan subsequently effected, the plaintiff, who was the agent of Tupper, the mortgagee, went to view the premises, and that the two Ibbistons showed him the lines and corners of the property, including both the land enclosed by the boundaries given in the deed and the land north of the road, as the property to be mortgaged. They pointed out to him in particular the north-east and north-west corners and a fence running half way between them, and they handed him a deed as a muniment of their title thereto. There was a house then on the premises north of the road in which the two Ibbitsons resided, and in which the defendant still resides.

The plaintiff deposed as follows:—"It was entirely on the faith of representations made by Thomas and James Ibbitson as to the property to be mortgaged and embracing this land that I lent the money, upon their statement that they wanted part of the money to finish the house, which would enhance the value of the security."

Under these circumstances, the plaintiff's counsel contended at the argument that the defendant was estopped by his conduct from disputing the plaintiff's title under the mortgage.

I cannot bring myself to this conclusion. I have strong doubts whether the doctrine of estoppel is applicable to sustain the plaintiff's claim for two reasons; first, because the statements made by the defendants before the mortgage was executed, were not only made in good faith, but were claimed and admitted to be true. There is nothing at all in the case to indicate any false statement, any reservation of the truth, or any intention to defraud. The plaintiff's difficulty lies not in any fault of the defendants, but in his own error in preparing the conveyance, without satisfying himself that he was using a correct description. So far from using any concealment, the defendant took him to the premises and shewed him the boundaries on the north side of the road, and if he accepted or used a description which made the road the northern boundary of the property, he, and not the defendant, was

to blame. What is the defendant to be estopped from denying? His language used before the mortgage was executed? But this he does not pretend to deny, but, on the contrary, declines to contradict the plaintiff's evidence on that point, and gives him the full benefit of it. What the defendant does deny is that the part of the premises north of the road is, in fact, included in the mortgage. His position is,—"true, I told you to put the whole of it in the description, but you did not do so. You chose to take a mortgage on a part instead of the whole of the premises, and you can only recover the part included in the mortgage." We have no evidence that the defendant furnished the defective description to the plaintiff, or misled him in any way, and I do not think that the doctrine of estoppel can apply when the matter alleged by way of estoppel is admitted by all parties to be true. In such a case the doctrine of estoppel is at least unnecessary, because the party claiming the estoppel has the benefit of the undisputed facts, without being compelled to resort to it.

The second reason why I think the doctrine of estoppel cannot apply in this case, is because the mortgagee was not by reason of the oral statements induced to change his position. I have carefully examined and considered the doctrine as laid down in *Freeman* v. *Cooke*, 2 Exch., 654, and all the leading cases, and the definitions of it given in all the leading textbooks, and I can find no case in which a party has been estopped in any way, from his having made a statement, whether true or false, whether *bona fide* or *mala fide*, unless the party claiming the estoppel, or his privies in title, have in some way altered their position on account of such statements, or on account of other conduct which may be ground for the estoppel.

The latest, and probably the most perfect, definition of this doctrine, is given by Sir J. F. Stephen, in his valuable little digest of the law of evidence, page 109, as follows:—"When one person, by anything which he does or says, or abstains from doing or saying, *intentionally* causes or permits another person to believe a thing to be true, and *to act upon such belief otherwise than but for that belief he would have acted*, neither the person first mentioned, nor his representative in interest, is allowed in any suit or proceeding between himself

and such person or his representative in interest, to deny the truth of that thing." In this case it cannot accurately be said that the plaintiff's assignor, the original mortgagee, advanced the loan or otherwise altered his position on the strength of the defendant's statements. Had the defendant gone to the lender and told him that he had given to his agent, the plaintiff, a mortgage containing this locus, and on the strength of that assurance obtained the loan, he would undoubtedly have been estopped from denying that the lands were included in the mortgage. But in this case the money was lent by the mortgagee, not on the ground that the defendant had said that the land was his and was to be a part of the security, but on the faith of his solicitor's assurance that the defendant had executed a mortgage including these lands. The difficulty was not that the defendant made false statements and thus misled the mortgagee, but that the plaintiff, as agent of the mortgagee, committed an error, for which he has made honorable reparation, in taking an assignment of the mortgage.

On these grounds, in my opinion, the doctrine of estoppel does not apply in this case.

I think there is also another reason why the doctrine of estoppel should not be held to apply, and that is because it is unnecessary,—because the plaintiff's claims in this action, clearly just and equitable as they undoubtedly are, are sufficiently protected by another principle of law which has not been so much vilified and slandered as the doctrine of estoppel, respecting which I will only remark, that while estoppels by record and especially by deed, have often wrought manifest injustice, estoppel *in pais*, or,—to lay aside a worn-out phrase, which may justly be designated as *legal jargon*,—"estoppel by conduct," is of a purely equitable character, and can never be productive of injustice, if applied with due care and discrimination to each individual case.

Let us now look at this case from a different point of view. If we read the description in the mortgage with the utmost care, it is impossible to discover on the face of it the slightest ambiguity. If there were any such, and the plaintiff's right to recover depended on the correction of a patent error in his

deed, he must fail, because the general principle of law is that parol evidence cannot be received to explain or amend a written document. Mistakes of that character may be remedied, it is true, in proper cases, but not in this Court. That is one of the exclusive functions of a Court of Equity.

But there is one well established case in which the common law courts will virtually amend a written document; that is, they will allow parol evidence to be given in explanation of its contents, and will read and construe the document as thus explained. The case is where a document, consistent on its face, contains concealed behind its words an ambiguity which no art or skill of the conveyancer could guard against. because he was ignorant of the facts which led to or created the ambiguity. For instance, a man makes a will in favor of his nephew John Stokes, but after his death it appears that he had two nephews of that name. In such a case evidence is admitted, first to show the fact of there being two nephews of that name, thus raising an ambiguity as to which of them he intended to favor in his will, and, the ambiguity being thus created, or rather unmasked, by the evidence, the Courts permit further evidence to be given, *e. g.*, the friendly relation of the parties to the testator and his verbal declaration as to his intention. The ambiguity which is thus raised by parol evidence is allowed to be explained by parol evidence, and the Courts, as well of common-law as of Equity, act upon the explanation as freely as if it were expressed in the deed.

Now to apply this principle to the present case. The mortgage gives a double description of the property,—first, as being the property on which the mortgagors then resided, and secondly, as being contained in certain boundaries, one of which is a highway. But it manifestly appears by uncontradicted testimony that the highway described as bounding the property on the north in fact intersects it, dividing it into two parcels; and further, that these two parcels correspond respectively with the two portions of the double description in the deed, one of them on the north side of the intersecting highway, on which the mortgagors resided, and the other on the south side of the same road, on which they did not reside, the boundaries of which correspond with the boundaries contained in the second part of the description.

This evidence thus raises, in this apparently consistent description, a very decided ambiguity, viz., what property was it intended to convey? Was it the portion north of the road on which the defendant resided, or was it the southern part included in the boundaries given? Or, was it the intention of the parties that the mortgage was to include the whole property then occupied by the defendants?

No answer to these important questions is given by the document itself, and unless it can be legally obtained from the other evidence in the cause, the plaintiff must fail in sustaining his verdict.

But, fortunately for the plaintiff, he was able to give, and has given, the most ample and satisfactory evidence, to clear up the difficulty. He has proved distinctly and incontrovertibly from the defendant's own lips and from his own recollection, that it was the intention of both parties that the whole property both north and south of the road, should be included in the mortgage. And so we must construe it. The insertion of three words, "including the lot," before the word "bounded," would have obviated all difficulty, and given the plaintiff what it was the intention of both parties he should receive; and, in my opinion, we should read the document as if these three words had been inserted in the description.

Although I have argued the case in this opinion on general principles only, I am glad to know that I am not without the support of several uncontradicted authorities, strictly analogous to the present case, and fully supporting my conclusion on this point, to one or two only of which I need refer. In *Macdonald* v. *Longbottom*, 1 Ellis & Ellis, 981, afterwards affirmed in the Exchequer Chamber, a written agreement in the form of an interchange of letters between the plaintiff and the defendants' agent was permitted to be explained by the introduction of evidence of previous conversations between the parties, so as to enlarge the terms of the written contract.

But the case which among those which I have consulted most nearly approaches the present in its circumstances, and is in fact identical with it, is *Paddock* v. *Fradley*, 1 C. & J., 90. In this case A, by agreement, promised to surrender into the hands of the lord of the manor, "all those brickworks, copyhold of inheritance *then in the possession of A*, with full

liberty," &c., to the use of B and C. No surrender was made, but B & C entered upon the premises. B afterwards surrendered his interest to C. The question being whether the *locus in quo* was comprised in the agreement, *B was called by the defendant to prove by parol declarations of the plaintiff that the locus in quo was so comprised.* His evidence was objected to because it was not competent to the defendant to extend by parol evidence the terms of the agreement *to premises not in the possession of A at the time.* Held, that the terms of the agreement, being ambiguous, might be explained by parol testimony. See also *Beaumont* v. *Field*, 1 B. & Al., 247; 2 Chit., 275; *Doe e. d. Malden* v. *Miller*, 1 B. & A., 699; *Radford* v. *Southern*, 1 M. & S.. 299; in which the principle is not less clearly and decisively of the present case elucidated. There are many other cases to the same effect. See *Fisher's Digest*, 3747, 3751; but these are more clearly in point from similarity of circumstances.

On the argument, it was objected on the part of the defendant, that the learned Judge at the trial rejected evidence to show that the title to the premises in dispute was, by conveyances prior to the mortgage, vested in third parties, and refused to permit the defendant to amend his pleas so as to let in evidence of such title. But inasmuch as the mortgage, as explained by the parol evidence and freed from its ambiguity, includes the locus, it operates as an effectual estoppel against the defendant denying his right to mortgage the premises.—not only an estoppel by deed but by conduct, because it is clearly proved that the money would not have been advanced by the mortgagee but for the defendant's statement that he was the owner of the property. To this extent, I consider the doctrine of estoppel to be strictly applicable. I am of opinion that the learned Judge was right in refusing to admit the evidence or amend the pleas, so as to render the evidence admissible.

For these reasons, I am clearly of opinion that the special verdict in favor of the plaintiff should be sustained, and the rule *nisi* for a new trial discharged.

I do not, however, wish to be understood as deciding that the deed from the Sheriff to the plaintiff under the foreclosure would have the same operation upon the *locus* as the mort-

gage, as above interpreted. It is based, it is true, on the mortgage, but the advertisement of sale must follow the mortgage, and the Sheriff's deed, the advertisement; but the parol evidence enlarging the property conveyed could not have influenced the sale by increasing the proceeds of the sale. It is by no means clear to me that a sale and a conveyance under a description so ambiguous as this would convey to a purchaser the right of the mortgagor beyond the land contained in the boundaries. I presume that in order to give the plaintiff the just benefit of this decision, without depriving the defendant of the benefit of the increased price, a resale of the whole property under a suitable advertisement may be necessary. What course ought to be adopted to attain this result, it is not my province to determine or suggest.

Verdict sustained with costs.

SIR WILLIAM YOUNG, C. J.—I concur in this judgment, but chiefly on the ground of estoppel. The defendant induces the mortgagee to lend him the money on a representation that he owns the house and land on the north side of the road, on which the money was to be expended so as to enhance the value of the security. He then executes a mortgage, excluding, by the description, both the house and the land north of the road. If he did this knowingly it was a fraud of which he cannot avail himself, if unknowingly, his defence is a fraud. Had a third party become interested by a *bona fide* claim, it might have been different, but here one of the mortgagors, the survivor, is the defendant, and by his act in delivering a mortgage inconsistent with his representation and the agreement made, he induced the mortgagee to believe what was untrue, and to act on that belief, which the law would not permit.

DESBARRES, J.—I agree that the verdict entered for the plaintiff, subject to the opinion of the Court, ought not to be disturbed. My opinion is based on the fact proved that the defendant and James E. Ibbitson, deceased, obtained the money for which the mortgage was executed, on the representation that they were the owners of the land on the north side of the road, as well as that upon the south, both of which was offered as security. The mortgagee, acting on the belief that the representation so made was true, advanced the money and

accepted the mortgage delivered to him, on the supposition that the land on the north side of the road which had been pointed out to his agent, was included in it when it was not. The defendant is therefore estopped from setting up a title to the land omitted in the description, inconsistent with his representation, which, if not held to be binding, would enable him to perpetrate nothing more nor less than a fraud on the mortgagee, which the law will not permit.

SMITH, J., concurred in the views of SIR WILLIAM YOUNG C. J., and DESBARRES, J.

BANK OF LIVERPOOL *v.* BIGELOW.

ACTION was brought against defendant as transferee of shares in the plaintiff Bank, for calls. There was no valid transfer of the shares under the Act, but defendant had paid calls, given a receipt for a dividend, combined with others in appointing a proxy, and being present at the trial, and hearing all this evidence, had not produced any evidence or offered his own testimony in reply.

Held, that he must be treated as a shareholder.

By the Act of 1871, c. 5, s. 32, not less than three Directors were constituted a quorum for the transaction of business. By s. 30 it was provided that Directors should be elected by the shareholders at the annual meeting, and that vacancies should be filled in the manner provided by by-laws, which, by another section, a majority of Directors for the time being, were empowered to make, but which had never in fact been made. In March, 1874, three of the Directors appointed one Innes a Director to fill a vacancy, and in September, 1874, a call was made by four Directors, one of whom was Innes, who seconded the resolution.

Held, that although Innes was not legally a Director, the call was valid, three of the Directors who made it being legally qualified.

By the resolution providing for the calls, the mailing of a circular to each shareh made an essential part of the notice. The Cashier swore that circulars had been prepared printed in part, and that it was the duty of the junior clerk to fill them up and mail them. The clerk swore that he had filled them up and mailed them, but on cross-examination said he had not read the print, and did not know what it was about. Defendant did not deny that he had received a circular. The Court having power to draw inferences of fact as a jury, found that notices had been mailed in sufficient time, as required by the Act.

THIS was an action to recover the amount of a call of $10 per share, on shares held by the defendant, as a stockholder in the Bank. The cause was brought on for trial at Liverpool, in October, 1877. After the plaintiff's evidence had been taken, defendant's counsel moved for non-suit, and the cause was thereupon reserved by consent for the Court to consider the questions of law raised on the motion for non-suit, with the powers of a jury as to questions of fact. The cause was argued February 6th, 1878, before YOUNG, C. J., and DESBARRES, MCDONALD and JAMES, J J.

Ritchie, Q. C.—This is an action for calls, under section 34 of chapter 5 of the Dominion Acts of 1871. The plaintiffs have brought themselves within the requirements of this Act. The President proves defendant a shareholder, liable for all the calls. It is contended on the other side that no registration of shares is good, unless with the consent of the transferee. Defendant's own letter in evidence admits that he was owner of five shares. He paid previous calls, and received dividends. Cites *7 M. & W.*, 574; *2 Q. B.*, 281; *L. R., 5 Ch.*, 489.

We have proved notice of the call for thirty days in a Halifax paper, and in the Liverpool "Advertiser," but not a notice for thirty days by circular to shareholders. Circulars were sent, but are not proved to have been sent thirty days before the time of payment. The Act is complied with, however, as thirty days notice of the call was given in the papers. We have an admission from defendant that he received previous circulars. We have the evidence of a clerk that he sent circulars of every call to every shareholder of the bank. That makes a *prima facie* case, and the defendant has not denied receiving a circular.

McCoy, Q. C., contra.—The principal question is, was this man a shareholder? We have pleaded fraud; the Bank was virtually bankrupt. The defendant might be holder of these shares, and not responsible to the Bank. There is not to-day on the bank books any transfer of shares to this defendant, nor any acceptance by him, as required by the Act.

As to notice, the plaintiffs have to prove that it was given in conformity with the resolution. The statute fixes the time at thirty days, and the resolution prescribes the mode; but the modes prescribed in the resolution are all subject to the statutable direction as to time. The resolution requiring the call was not passed by the requisite number of directors. The Act making three a quorum refers only to the *ordinary* business of the Bank, the discounting of notes, &c. The resolution here was equivalent to a by-law, in prescribing the call and mode of notice; it was passed at a meeting when only three directors were present, out of seven; it should have been passed by at least four, a majority of the directors, the number mentioned in the thirty-third section of the Act.

One of the calls was invalidated by the act of the directors appointing a man, Joseph Innes, as a director, who voted for the call. The Act specifies that in case of a vacancy in the list of directors, the vacancy shall be filled in the manner prescribed by the by-laws; but there were then no by-laws. Innes was voted a director by three directors only; four might have passed a by-law and elected him. Cites *3 Exch.*, 407; *4 DeG. J. & S.*, 191; *2 Exch.*, 118.

The fact of receiving dividends does not prove defendant a shareholder, any more than his paying previous calls. If it did make him a shareholder, it should have been pleaded. There is no such thing as estoppel here. Cites *1 Lindley on Partnership*, 138, 657; *4 H. & N.*, 160, 580; *7 C. B., N. S.*, 799 to 809; *6 C. B.*, 349 to 356; *4 Exch.*, 699; *2 Exch.*, 125; *7 M. & W.*, 260; *3 Exch.*, 402. As to the question of estoppel, *1 Best & Smith*, 632 to 634; *L. R., 9 Ch. Ap.*, 22; *6 Bingh., N. C.*, 135; *Roscoe's N. P.*, 1161; *Fisher*, 7197; *2 Lindley on Partnership*, 920.

Ritchie, Q. C.—The English Act on this subject is *8 & 9 Vic.*, c. 16. See *B. & L.*, 141.

Weatherbe, Q. C.—This is simply a question whether a statute has been complied with. It is not for the jury. Even if a verdict had been given it would have been set aside. Section 34 requires proof that the defendant was a shareholder and this statute does not abrogate anything necessary to the proof of that, except that it provides that a shareholder may be a witness in the case. I suppose that it is inserted to meet the law in Quebec, which to-day would preclude a shareholder from giving evidence were it not for this act. That does not, however, take away the necessity of proving that the defendant was a shareholder. There is no proof of that here except his letters. Dr. Forbes swears he knows he was a shareholder, because his name was on the roll. That is no evidence, and if a verdict had been given on that evidence, it would be set aside. Their placing him on the roll does not make him a shareholder. The question is, were the shares legally transferred to him? Forbes says he does not know it from the original subscription book, or the transfer book. The way to prove the transfer would be to produce the trans

fer book, which they did not produce. The transfer was not legal according to the statute. Even if he admitted he was a shareholder, if he was not in fact legally so he would not be bound by his admission. (McDONALD, J.—Unless he was estopped.) Not only is he not proved to be a shareholder, but he is proved not to be unless he can be shown to be by his own admissions in his letters. In those he simply says that he purchased them, not that he has become legally liable for them. He never got a certificate of stock. He could not get a certificate with the books in the condition they were. Suppose that upon his writing as he did, they had replied, as they might have done, that he was not the legal transferee of the shares, that he was not a legal shareholder. In that case he certainly would not be the holder of them. The correspondence is without prejudice. He simply asked for information in the first letter. In the next he asked for a certificate, and he never got it. (DESBARRES, J.—Can we not infer that he got the certificate from the fact of his sending his check for his calls. JAMES, J.—They paid him a dividend, and so altered their position. Is not that an estoppel?) I go this far, that we could recover the money back that was paid, because there had been no legal transfer of the shares. There is no identification of the shares as to which the admissions in the letters are made with the shares on which the action is brought. Innes was not legally a director. See Interpretation Act, 1867, section 7, sub-section 27. He was not legally appointed, and it is no answer to that to say that others were there who were legally so. (YOUNG, C. J.—If three directors could make a call, and four were present, including Innes, does it make any difference if Innes was not legally a director?) In the first place, we contend there were only two there. But further, we contend that Innes being there, and seconding the motion, made it an illegal act.

The notice is not proved. (Refers to evidence.) The circular initialled by the Judge was never tendered in evidence. Newspaper notice is not enough, unless made so by statute. A circular should have been shown to have been sent thirty days beforehand.

Ritchie, Q. C., in reply.—The question of the insolvency of the Bank has nothing to do with this matter. It can sustain an

action against a shareholder, even if insolvent. But the Bank resumed specie payment, and paid every claim against it within ninety days. The English Act is 8 & 9 Vic., c. 16, sec. 23. Our Act enables us to prove that the defendant is a shareholder by any one witness. We have not to show that he is a registered shareholder. Dr. Forbes proves that he was a shareholder.

The transfer book was produced, the counterfoil, and it is in proof that the papers torn off were signed by the transferees, and sent to Farquhar & Forrest to be accepted by the defendant, but were never received back. He was sued for previous calls, and actually paid them after being sued. He also received dividends.

The cases I have cited show a clear right in the plaintiffs to recover. The case cited contra, *4 H. & N.*, is peculiar. There was a special clause in the Act stating that the defendant was not to be deemed to have accepted shares unless he did so in a particular form, which was not complied with. The case in 7 *C. B., N. S.*, does not touch this at all, because they put a person's name on the Register without any authority at all.

The circulars are in as much as the letters. They must be in evidence, because a cross-examination took place upon them. Marshall was examined with these papers in his hands. They were put in as printed forms, similar to those filled up and sent out. They were not presented as exact copies.

Under the Act three directors were a *quorum* for all business. The only restriction is as to passing of by-laws. There were more than three directors for the first call; and three, the legality of whose position was not questioned, ordered the second call. The fact that Innes seconded the motion is of no consequence, as a motion was not necessary.

This is a case of a Bank proceeding to collect from its own stockholders for the benefit of outside parties.

Under the English Act a special notice to each shareholder is required; (see *Roscoe*, 1161,) but by the special acts of incorporation a general notice is usually made sufficient, and the authority just cited shows how liberally the law as to proof of notice is laid down. I admit that if it is required

that the notice should be mailed thirty days before the call, we have not proved that, but it is not to be presumed that the notices were not sent before the call.

SIR WILLIAM YOUNG, C. J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This action is brought for two calls, each of ten per cent. on fifty-five shares, alleged to have been held by the defendant in the Liverpool Bank, incorporated by the Dominion Legislature, and governed by the Dominion Act of 1871, 34 Vic., ch. 5. The form of action is prescribed by sec. 34, and various defences were put in, which, upon the trial and argument, resolved themselves into two.

First; was the defendant a shareholder at the respective times the calls were made?

Secondly; were the calls duly made by the Directors, and was the defendant duly notified thereof?

The defendant was not an original shareholder, but a purchaser in November, 1872, and the 19th section of the Act provides, "that no assignment or transfer shall be valid, unless it be made and registered and accepted by the party to whom the transfer is made, in a book or books to be kept by the Directors for that purpose." Several books were produced at the trial, but none of them at the argument, and I learn their contents only from the Judge's minutes. There was a stock journal in which the defendant's name appears, and a transfer book, in which there is no transfer or assignment signed by the transferor to the Defendant, but a countervail showing that the transfer was effected, but no transfer or assignment registered or accepted by the defendant. It follows that there was no valid transfer under the Act and the numerous cases cited at the argument on the Imperial Public Companies' Acts, 8 and 9 Vic., chap. 16; and 25 & 26 Vic., chap. 89; and the Joint Stock Companies' Acts of 1856 and 1857. The question then is, has the defendant under another set of decisions precluded himself from setting up this defence. He bought the fifty-five shares shortly before 22nd November, 1872, as appears by his letter. In January, 1873, he paid a call of 10 per cent., and has paid 65 per cent. in all on these shares. In March, 1873, he gave a receipt for a dividend of four per

cent. thereon. In January, 1874, he paid the Sheriff $1,100, and in June, 1874, a further sum of $27. In January, 1875, he combined with four other shareholders in appointing a proxy to vote for them at the annual meeting. Finally, as was admitted at the argument, he was present at the trial before Mr. Justice McDONALD, and heard all this evidence, without producing any, or being himself produced in reply. It was strenuously urged that these various steps were insufficient to create a liability, and that a compliance with the statute was indispensable; but, as we might naturally expect, the language of the law is in a different tone. In *Sheffield, &c., R. R. Co.* v. *Woodcock*, the transfer was in blank, with the consideration stated untruly, but the purchaser signed a proxy paper, describing himself as a shareholder, and it was held that in an action for calls to the Company, he was estopped from denying the validity of the transfer; *7 M. & W.*, 574; *1 Lindley on Partnership*, 136, 138. See also *Cheltenham, &c., R. R. Company* v. *Daniel*, 2 Q. B., 281. In *The Cromford, &c., R. R. Company* v. *Lacy*, 3 Y. & J., 80, in an action for calls, the defendant was held liable, because, though he had not executed the Company's deed as he ought to have done, he had, with a full knowledge of all material facts, acted and been treated as a proprietor of shares. See also *ex parte Nichol*, in the case of a Bank, 3 DeG. & J., 387; *Ewart on Banking*, 493; and the *Irish Peat Co.* v. *Phillips*, 1 B. & S., 598, though *Lindley* considers this case as leaning the other way.

On the validity of the two calls, or either of them, and the notices, we must first of all revert to the Act of 1871. There were seven Directors, and by the 33rd section a majority of the Directors for the time being have power to make by-laws, but no by-laws in point of fact were made. By the 32nd section, at all meetings of the Directors not less than three of them shall constitute a board for the transaction of business. By the 30th section the Directors are to be elected by the shareholders at their annual meeting, and in case of a vacancy ocurring in the number of Directors, such vacancy shall be filled in the manner provided by the by-laws. By the 34th section the Directors shall have power to make calls and to bring actions therefor, and, to maintain

such action, it shall be sufficient to prove by any one witness, (a shareholder being competent, and which was done in this case by the president of the Bank,) that the defendant, at the time of making the calls, was a shareholder, and to produce the by-laws or resolution of the Directors making the calls, and to prove notice thereof, given in conformity with such by-law or resolution, provided that such calls shall be made at intervals of not less than thirty days, and upon notice to be given at least thirty days prior to the days on which such calls shall be payable, and no such call shall exceed ten per cent. of each share subscribed.

The two calls in this case were made by the Directors on the 22nd September, 1874, and the 1st February, 1875, payable, the first on the 10th November, 1874, and the second on the 25th March, 1875, at the Banking house at Liverpool, or at the Bank of Nova Scotia in Halifax,—notice of the same to be given in the Liverpool "Advertizer," and one Halifax paper, as also by circulars mailed to each shareholder. On the 9th March, 1874, three of the Directors appointed Joseph Innes a Director in place of M. P. Black, resigned; and the call of 22nd September, 1874, was made by four Directors, including Innes, having been moved by Thomas Rees, seconded by Innes. At the annual meeting, 28th January, 1875, seven Directors were appointed, including Innes, and he concurred with two other Directors in the call of 1st February, 1875.

On these facts it was contended that Innes was not legally a Director on the 22nd September, 1874, in which I concur, and that it required four, being a majority of the Directors, to make a call,—an objection, I think, which cannot prevail, the making of calls being an ordinary and essential part of the business of banking, which three Directors, under the 32nd section, are competent to transact.

Then, as to the notices of the two calls, the first was proved to have been given in the Liverpool "Advertizer" from 1st October to 5th November, 1874, and the second, on the 4th, and from the 11th February to 11th March, 1875, both inclusive. The two notices were also shewn to have been published for thirty days in the Halifax "Chronicle." The mailing of the circulars was not proved to have been thirty days before the respective days of payment. The Cashier said;

"There were circulars prepared for shareholders printed in part," and which were produced at the trial and argument, both for the November and February calls. "It was the duty of the junior clerk, John Marshall, to fill up and mail the circulars. The names were taken from the stock register, and the memorandum book of stocks falling due. The names are alphabetically upon the register." The memorandum book from which the names were taken was prepared by the cashier, and the circulars filled up from that. This memorandum book was in evidence. Marshall testified that he was clerk from May, 1874, to November, 1876. He said; "I made out the notices for all the calls while I was there. I filled up circulars like those produced,—filled in the blanks for stockholders from this book,—addressed the envelopes from the same book. I inclosed the circulars,—stamped them for the Post Office, and mailed them. I mailed circulars for all the calls for every one named in this book." In his cross-examination, in which he did not appear to advantage, he says, "Had no name on the circular. I don't know that I read the print. Don't know what it was about. Never got a notice of having made a mistake."

Now what is the effect of this evidence as to the mailing? There is no proof of a notice having been addressed or mailed for the defendant, nor could it be expected. In all such cases we must look to the course of business on the principles illustrated in *Hetherington* v. *Kemp*, 4 Camp., 193, and *Skilbeck et al.* v. *Garbett*, 7 Q. B., 846. The evidence in these cases, especially the last, is not so strong as in this. Here is a cashier, knowing that thirty days notice is required, directing the circulars to be prepared, and the clerk filling up the blanks in the printed forms, addressing them to the shareholders and mailing them as they appear in the alphabetical list. The two officers, the cashier and the clerk are each in the discharge of the duty they owe to the Bank, and if such evidence were rejected it would be difficult to establish a legal notice to a numerous body of shareholders. The rule empowers the Court to draw inferences of fact as a jury, and I think we are justified in finding that notices of the calls were mailed to the defendant in sufficient time, as required by the Act. We must not forget, too, that he did not deny it.

It was argued that each of the three notices for each call was required to be given thirty days before the day of payment, but no authority was cited for this position, which appears to be unreasonably stringent. Our attention has been called since the argument to the case of *Garden Gully Mining Company* v. *McLister*, 33 L. T. R., N. S., 468, decided by the Privy Council on appeal from Victoria in 1875. It affirms the general principle that there must be properly appointed Directors to make a call, or to declare a forfeiture of shares, and set aside a call made at a meeting not duly advertized as required by the rules of the Company; that the election of five Directors was invalid, that is of all the five; and that a forfeiture declared by three of these five was also invalid. But the two calls in this case were concurred in by three legally appointed Directors under the 32nd section of the Act.

For these reasons I think that the liability of the defendant has been established, and that the plaintiffs should have judgment for the sum of eleven hundred dollars and costs. Interest thereon is claimed in the writ, but nothing was said thereon, nor was the forfeiture of ten per cent. claimed at the argument under section 35.

CITY OF HALIFAX v. SEETON.

THE Provincial Act of 1873, cap. 14, sec. 1, empowered the Board of Commissioners of City Works, under the sanction of the City Council, to order the construction of a sewer along any street, without the requisition of owners of property along the street, and the Act of 1874, cap. 32, sec. 1, provided that upon the petition of half the owners of property on any street, and the deposit with the City Treasurer of certain amounts chargeable under the Act, the City Council should order a sewer to be constructed unless for sufficient reasons to the contrary. The Act of 1874 further repealed a section of the Act of 1873 and substituted therefor a section, pointing out the manner in which the cost of construction should be borne and providing that all moneys chargeable to property owners under that Act should become due from the order or resolution to construct a new sewer, whether such sewer had been petitioned for, or ordered by the Council for the benefit of the city without petition. The owners of property on South Park Street applied by petition for a sewer from Victoria Road along South Park Street to Inglis Street, 480 lineal feet. The City Engineer reported upon the petition that, in order to provide a proper outlet for the proposed sewer, it would be necessary to build 850 lineal feet down Inglis Street; upon which the Council passed a resolution, 'that the petition of the rate-payers in South Park Street *and Inglis Street*, for the construction of a sewer *on said streets*, together with the report of the engineer thereon, be received and adopted, and that the Board of Works be requested to have such sewer constructed.' The sewer was constructed, and a suit brought against defendant, who lived on Inglis Street, for his portion of the cost of construction on Inglis Street.

Held, that the Council had power to order the construction of a sewer on Inglis Street without any petition, to the cost of which property owners on Inglis Street were bound to contribute, and that the resolution might be regarded, first, as authorizing the construction of a sewer on South Park Street in compliance with the petition of the property owners on that street, and, secondly, as an order emanating from the Council itself for the construction of a sewer on Inglis Street, irrespective of any petition.

THIS was an appeal on the part of plaintiff from a judgment of Judge JOHNSTONE, of the County Court. The action was brought by the city to recover sewer rates for a new sewer built on a street in front of defendant's property. Defence, that the drain was not constructed in conformity with the statute.

Thompson, on behalf of defendant, objects that the rule for appeal does not set out sufficient grounds for appeal, under chap. 6 of the Provincial Acts for 1877, sec. 25. The grounds set out are too vague.

The appeal is made in the rule to the next sittings of the Court, not to the Term.

Shannon, *Q. C.*, in support of appeal.—The statutes bearing upon the case are the Provincial Acts for 1873, p. 21, ch. 14, secs. 1, 3, 4 and 13; Acts of 1874, p. 50, ch. 32, secs. 1, 3 and 4; Acts of 1876, p. 72–3, ch. 32, sec. 2. The 1st section of the Act of 1873, gives the City Council ample power to construct drains anywhere of their own mere motion. Then there is a mode laid down by which the construction of drains is to be secured where private parties desire it, and the Council does not construct them of its own motion. As the mode prescribed in sec. 4 of the Acts of 1873, was cumbrous, the Legislature passed an Act in 1874, substituting a new section for the previous one, declaring that a party owning property along the line of a sewer constructed, should pay $1.25 for each foot of the drain directly in front of his property, whether, as we contend, the drain is built upon petition, or on the mere motion of the Council. The 13th section of the Act of 1873, says, that the owner of property who has contributed to an old drain shall be allowed the use of the new drain free for as many feet as he has previously contributed towards.

Thompson, with whom was *Lynch*, *Q. C.*, contra.—Under the terms of the resolution directing the construction of this sewer, the City Council has assumed to act under a petition, whereas there is only a petition for the Park street drain. The statutes here, giving a majority of the property-owners power to bind the minority, should be strictly construed. The old sewer, some 1200 feet in length, was built solely upon and

because of a petition of a majority of property owners along some 400 feet of its length, thus binding a large majority of the property owners of the district by the petition of an actual minority. The City Council has never, in regard to this sewer, exercised its power to direct the construction of a sewer of its own motion. The City Council had not power at the time of the construction of this drain to assess the adjacent properties for drains constructed without petition. Chapter 48 of the Acts of 1860, was the first Act providing for the assessment of property owners for drains built upon petition. But it was not until the passing of Chapter 34 of the Acts of 1872, that the principle was put into practical operation. In 1873 a further act was passed, already cited. There is nothing in the Act of 1873 to authorize the assessment of property owners for drains built without petition. The Act of 1874 contains no positive enactment declaring that property owners shall contribute to drains built without petition, but assumes such legislation to have previously existed. In 1876, after this action was brought, the City Council procured the passage of an act by the Legislature declaring that property owners *shall* (thereafter) be assessed for drains built without a petition.

Defendant comes within the exception in Sec. 13 of the Act of 1873, having contributed to a previous sewer for the same property.

Shannon, Q. C., in reply.—The construction of the whole sewer was due to the petition respecting Park Street, but that fact cannot alter or diminish the authority the City Council had to construct the Inglis Street sewer without a petition. The sewer to which Mr. Seeton is said to have contributed does not drain his property, to use the language of the Act; it merely comes near the corner of his lot. There is no evidence that he paid the city anything for that drain.

DesBarres, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

This is an appeal from the decision of the Judge of the County Court for District Number One in this suit, which was brought to recover from the defendant the sum of $290 as his portion of the cost of constructing a common sewer through

Inglis Street, on the south side of which he is the owner of property on which he resides. The defendant resists the payment of this sum, on the ground that the sewer was not built in conformity with the requirements of the Acts of the Legislature relating to Sewers in the City of Halifax, and, the learned Judge before whom the cause was tried having decided that the Plaintiff is not entitled to recover, we are now called upon to express the opinion we entertain on the subject matter of contention, in view of the law and evidence on which the liability of defendant is sought to be established. It appears from the learned Judge's report that the owners of real property on South Park Street applied by petition to the City Council to construct a sewer from Victoria Road along that street to Inglis Street, a distance of 480 lineal feet; that the City Engineer, on this petition being referred to him, reported that, in order to provide a proper outlet for the South Park Street sewer, and to divert a brook, it would be necessary to build 850 lineal feet of sewer down Inglis Street from South Park Street to Bland Street, to be twenty-eight inches in diameter, which, though larger than at present required, would in all probability be sufficient for the requirements of after years. This report, containing an estimate of the cost of the work on South Park Street, and of its extension from thence on Inglis Street to Bland Street, was submitted to and considered by the City Council, and on the 30th August, 1875, a resolution was passed to this effect:—

"On reading the report and petition of property owners in South Park Street for a sewer in that locality,

"*Resolved*, That the petition of the rate-payers in South Park Street and Inglis Street, for the construction of a sewer on said streets, together with the report of the City Engineer thereon, be received and adopted, and that the Board of Works be requested to have such sewer constructed as soon as possible."

On this resolution the Board of Works constructed a sewer from Victoria Road, along Park Street to Inglis Street, thence down Inglis Street until it connected with a crock drain at the junction of Bland Street with Inglis Street; and the question now arises whether the sewer from South Park Street along Inglis Street to the point already mentioned, was in

compliance with the petition presented to the City Council, in which no sewer along Inglis Street was asked for, or whether it was made by the order of the City Council irrespective of that petition on the representation of the City Engineer that the sewer from Victoria Road along Park Street to Inglis Street, could not be made without a continuation of that sewer 850 lineal feet down Inglis Street, in order to give an outlet to the South Park Street sewer, and divert a brook flowing through McLean's property. The resolution itself is vague and carelessly drawn, and inconsistent with the statements embodied in, and with the prayer of the petition, inasmuch as it speaks of a petition from the rate-payers of South Park Street and Inglis Street, when in point of fact it is a petition signed only by the rate-payers in South Park Street praying for the construction of a sewer from Victoria Road along South Park Street to Inglis Street, and no further. By chap. 14, sec. 1, of the Acts of 1873, "the Board of Commissioners of City Works, under the sanction or by the direction of the City Council, may order the construction or repair of any sewer or drain in any street in the city, without the requisition of the owners of property along such street; and by chap. 32, sec. 1, of the Acts of 1874, it is enacted that "whenever one-half of the owners of property on any street or thoroughfare, shall petition the City Council for the construction of a common sewer or drain, and shall have deposited with the City Treasurer the amounts chargeable according to the provisions of this Act, to each owner whose signature is in the petition, then the City Council shall, unless for sufficient reason to the contrary, order the same to be constructed within a reasonable time." It requires that every petition shall state the locality in which the new sewer is to be made, the points between which the petitioners are desirous of having the same constructed, the distance in feet between such points, the names of the owners on either side of the street, and the frontage of each property chargeable under the provisions of this Act.

Section 2 states the cost of constructing any common sewer, and directs that all moneys chargeable and to be assessed on property owners under the authority of this act, shall become due from the date of the order or resolution of the City Council to construct any new sewer,

whether such sewer has been petitioned for by interested persons, or has been ordered by the Council for the benefit of the city without such petition. All the requirements of the law appear to have been observed by the petitioners to entitle them to have an order for the construction of a sewer from Victoria Road to Inglis Street, but there was no application on the part of the owners for the construction of the sewer in Inglis Street, towards the expense of which the defendant is now required to contribute.

It was contended by the learned counsel for defendant at the argument of this cause, that the City Council had no power to order the construction of a sewer in Inglis Street, in the absence of a petition from the majority of the owners of land therein, but I think that position cannot be sustained. There are two modes by which a sewer may be constructed within this city, one by petition to the City Council, in conformity to the Act of 1874, and the other by an order of the City Council, which, under the Act of 1873, may be granted without the presentation of any petition. It is possible that the power conferred by this Act may be exercised improvidently and without a proper regard for the public interest and its requirements. In the present case it appears to have been judiciously and properly exercised, with the view more particularly of giving to the owners of property in South Park Street to the south of Victoria Road, the important privileges of drainage, and to the owners of property in Inglis Street the same privilege, which, though not absolutely essential at the present day, may, it is hoped, soon be found of great value and indispensable. Looking at all the circumstances of this case, I think the resolution of the City Council of the 30th of August, may be regarded as being of a two-fold character; first, as containing an order directing the Board of Works to construct a sewer from Victoria Road to Inglis Street, in compliance with the petition of the owners of property on South Park Street, and, next, as an order emanating from the City Council itself, irrespective of any petition, to construct a sewer from the end of South Park Street along Inglis Street, as an essential outlet of the other. By putting this construction on the resolution, which, if it is to have any effect at all, I think, must be given to it, no injustice will be done to either party. The

owners of property in Inglis Street will then be liable to pay a proportionate part of the expense incurred in an important and necessary work which, though not asked for, is beneficial to them, and the city will be held responsible for the rest. In my view, it follows that the judgment of the learned Judge of the County Court must be reversed.

IN THE MATTER OF GRAHAM & McKAY, INSOLVENTS, AND THE BANK OF NOVA SCOTIA, CLAIMANTS.

GRAHAM, the active member of the insolvent firm, made a number of promissory notes in the firm name in favour of one Thomas Fraser, by whom the notes purported to be endorsed, but the endorsements were all of them forged. The notes were presented to the claimants and negotiated by Graham, who received the money on them, and a large part of the proceeds was appropriated to partnership purposes.

Held, that although the Bank could not claim on the notes, it could rank for the amount of them as money paid.

IN this case the claimants sought to rank upon the estate of the insolvents for $3,800, the amount of six promissory notes, purporting to be made by the insolvents to one Thomas Fraser, and endorsed by him. The claim was resisted mainly on the following ground; "Because the said promissory notes were never issued by said firm as a firm liability or otherwise, but the same were issued by Thomas Graham, one of said firm, in fraud of his partner, and the same were forgeries, (*i. e.*, the endorsement,) perpetrated by the said Thomas Graham before the same were issued, and he unlawfully issued the same, and had them discounted with the claimants, and received and appropriated the proceeds to his own use in fraud of and without the knowledge of his partner." The contestation took place before MORSE, J., of the County Court, who, in his report upon the case, said it appeared to him that the notes in question had been made by the firm of Graham & McKay, and by a person accustomed and authorized to make them, namely, Thomas Graham, that at the several dates at which they were made they were presented to the Bank, and negotiated by Thomas Graham, the chief member of the firm, and the money received thereon by him; that a large portion of the money so received on these notes went to pay the firm liabilities; that if the endorsements were forged, which was contended, they were forged by

the leading member of the firm, who was privy to the forgery and knew of it. His Lordship therefore disallowed the objection to the claim.

The question came before the Court on appeal from this decision.

Tupper.—In considering the case, we may dismiss the matter of insolvency. It would be necessary for the Bank, in order to recover, either to declare on the notes or on the money counts. If, with a declaration of either kind, they would be unable to succeed in an action at law, they must fail here. This was not a partnership transaction at all. The partnership is bound only by acts done with their authority. He had authority to make the note in the partnership name, but only for partnership purposes. He can only bind them by signing the firm name. If he made a note in his own name and applied the proceeds to partnership purposes there would be no claim on the firm. Unless they can show that Thomas Fraser, an actual payee, endorsed the note, they cannot succeed. Thomas Fraser swears that he is the only Thomas Fraser, and that he did not endorse the notes. Even if there was a Thomas Fraser who had actually endorsed them, that would not be enough. It is not enough that the firm obtained the benefit of the contract. The question is whether they authorized it.

YOUNG, C. J.—The Bank could not recover against the firm on the note. Could they not recover for money?

Tupper.—No. If it was not a partnership transaction they are not liable. *9 M. & W.*, 28; *2 Camp.*, 9, 17; *9 D. & R.*, 19. You must show at the beginning that it was a partnership transaction. Only part of the money is proved here to have been applied to partnership purposes.

YOUNG, C. J.—The question is, did the partnership get the money, and was Graham authorized by the firm to get it for them.

MCDONALD, J.—It is the same as if the two partners had gone to the Bank and got the money. The one got it with the implied authority of the firm, and appropriated it to the use of the firm. The firm ratified it by accepting the money.

Graham, contra.—Cites *15 Mass.*, 75; *Ib.*, 331; *2 C. & J.*, 425; *Byles on Bills*, 201.

SIR WILLIAM YOUNG, C. J., now, (March 12th, 1878,) delivered the judgment of the Court:—

In this case the claimants seek to rank upon the estate of the insolvents for money paid upon promissory notes discounted by the claimants for the insolvents, Graham & McKay, a firm that had been doing business at New Glasgow, and in which Graham appears to have been the active man. Among other papers were produced six promissory notes purporting to be made in favor of Thomas Fraser. Now there is a Thomas Fraser in New Glasgow known as "Yankee Tom," and the Bank assumed that the notes in question were endorsed by this Thos. Fraser. But they were forged, all six of them. The Bank therefore could not claim upon the notes, because they must claim as indorsees, and must in order to do that show that either this "Yankee Tom," or some other Thomas Fraser, was the actual payee. Unable to do this, they could not recover. It is the case of a fictitious payee, and the question is, have they no claim against Graham & McKay. Graham was the acting partner, with whom the Bank dealt in good faith, and they advanced to him this money upon false pretences and upon fictitious paper. Have they no right to claim it from the firm? I think they have. They dealt in good faith with the party entrusted with the management of the business, and a large portion of the money was applied to the payment of the admitted liabilities of the partners. It has been so held in *15 Mass.*, 75 and 331. In one of the cases referred to, the partnership was held liable, although none of the proceeds were applied to the partnership business, the partnership being bound by the illegal acts of the partner professing to act in the partnership name. We hold, therefore, that this is a just claim and must rank on the estate.

THE QUEEN v. RUSSELL.

PRISONER was tried at Amherst upon an indictment containing two counts, one for robbery and the other for receiving stolen goods. Both offences were proved to have been committed at Truro, and the jury found a general verdict of guilty on both counts.

Held, that the prisoner should have been proceeded against only on the count for receiving, and that although he might be guilty of both offences, as the robbery was committed in another County than the one in which the prisoner was tried, he must be discharged.

ON one of the motion days of the present term, *McCoy, Q. C.*, moved to quash the conviction of the defendant, who had been found guilty upon two counts, first for robbery, and, secondly, for receiving stolen goods. It appeared that the prisoner had been tried at Amherst, in the County of Cumberland, for a robbery, a compound felony, including the breaking open of the shop where the goods were, committed at Truro, in the County of Colchester. That was the difficulty under the first count. Under the second count he had been convicted of receiving stolen goods, being the same goods stolen by himself. *2 Russell on Crimes*, 116.

SMITH, J.—I should have disposed of the case myself, but that the points did not come up till after verdict.

DESBARRES, J., now, (March 12th, 1878,) delivered the judgment of the Court:—

The prisoner was tried at Amherst, in the County of Cumberland, before my brother, SMITH, upon an indictment containing two counts, one for robbery, and the other for receiving stolen goods knowing them to have been stolen. Both of these offences were proved to have been committed at Truro, in the County of Colchester; and, the jury having found a general verdict of guilty against the prisoner on both counts, the question is, whether the conviction under these circumstances can be sustained. The learned Judge, entertaining great doubt as to the legality of the conviction, reserved the question for the opinion of the full Court, and directed the prisoner to be remanded without passing any sentence upon him, and he has since remained in imprisonment awaiting the judgment of the Court on the point submitted. The case having lately been argued before the Court, we have considered the subject, and concur in the opinion that the conviction cannot be upheld. The offence of larceny is considered

as committed in every county or jurisdiction in which the thief carries the goods, for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption. *2 East., P. C.*, chap. 33, 52. It is therefore laid down that if a man steal the goods in the Counties of A. and B., he may be indicted for the larceny in the County of B., but if a compound larceny be committed in one County, and the offender carry the property into another, though he may be convicted in the latter County of simple larceny, he cannot be convicted of compound larceny. *Russell on Crimes*, 116.

The prisoner, having been tried in Amherst in the County of Cumberland for offences constituting a compound felony committed in an adjoining County, ought only to have been proceeded against on the count for receiving stolen goods, for which offence, if he had been convicted of that alone, the learned Judge before whom he was tried would have awarded him the punishment authorized by law, but he has been tried and convicted of both offences, and, although he may be guilty of both, we think, for the reasons given, that he cannot be sentenced to any punishment for either, and that he is therefore entitled to his discharge.

THE QUEEN *v.* HICKMAN.

In order to estreat a recognizance taken under cap. 30, of the Dominion Acts of 1869, all that is required is a certificate from the proper officer (under sec. 45 of the act,) that it is forfeited. Upon that a rule *nisi* is taken out on affidavit of the facts, and if no cause is shown, judgment follows, but without costs.

Practice in the Queen v. Thompson, 1 Thomson, 9, affirmed.

McCoy, Q. C., on one of the motion days of the present term moved to estreat the recognizance of the prisoner.

Sir William Young, C. J., (January 26th, 1878,) referred to the case of the *Queen* v. *Thompson*, Thomson's Reps., p. 9, and said that the practice established by that case had been followed up to 1869. The Criminal Statutes of Canada, passed in that year, required that an endorsement should be made on the recognizance, while the affidavits in this case had been drawn up in view of the old practice. The papers would

therefore be handed back in order to have the endorsement required by the Act of 1869, upon which a rule would follow as a matter of course.

McCoy, Q. C., (February 16th, 1878,) having obtained a certificate of the Stipendiary Magistrate endorsed on the recognizance, of the non-appearance of the prisoner, again moved for and obtained a rule *nisi*.

Ritchie, Q. C., (March 1st, 1878,) moved on affidavits of service of the rule *nisi* to make the rule absolute.

SIR WILLIAM YOUNG, C. J., now, (March 12th, 1878,) delivered the judgment of the Court:—

We affirm in this case the practice followed in the *Queen* v. *Thompson*, 1 Thomson, 9. Where a man enters into a recognizance, all that is required is a certificate from the proper officer that it is forfeited. Upon that a rule *nisi* is taken out upon affidavits of the facts, and if no cause is shown, judgment follows, but without costs. This is a simple and effective remedy which ought to be known all over the Province, because in point of fact in many cases all over the Province the recognizances entered into are a dead letter, and the enforcement of the criminal law is to a large extent defeated.

McKEEN *v.* NASS.

ACTION was brought on a joint and several promissory note made by four promisors, one of whom was dead. The action was brought against the three survivors, the declaration setting out the note as made by the three defendants, naming them, "together with one John Nass," the deceased promisor, but it did not add that he was dead, or show any reason why he had not been made a defendant. A verdict was taken for plaintiff by consent, and a rule to set it aside.

Held, that the objection was one that should have been taken by plea in abatement, and could not be made a ground of objection to the verdict for plaintiff.

THIS was an action on a promissory note, tried at Lunenburg, before JAMES, J. The note was joint and several, made by four promisors, three only of whom were sued, the fourth, John Nass, being dead. The declaration set out the promissory note as made by the three defendants, naming them, together with one John Nass, but it did not add that said John Nass was dead, or show any reason why he was not made a defendant. The defendants pleaded separately to the

declaration, and in the plea of one of the defendants, George Nass, the fact of the death of John Nass was set out.

A verdict was taken for the plaintiff, by consent, and a rule to set it aside was argued this term.

McCoy, Q. C., in support of rule. The contract in the note is a joint and several promise to pay with one John Nass. The action is brought against only three persons jointly. If Nass promised jointly with the others he should have been sued with them.

The COURT.—The words "we and every of us make it joint and several.

McCoy, Q. C.—Then the parties should all have been sued jointly.

The COURT.—One of the pleas says the fourth man is dead.

McCoy, Q. C.—That does not prove the fact. There was no evidence of the fact.

MCDONALD, J.—It is sufficient as regards the defendant who pleaded it.

JAMES, J.—This point was not taken at the trial.

YOUNG, C. J.—This Court ought to have the power to amend the declaration, if satisfied that the fourth defendant is dead. This is a strictly technical objection.

McCoy, Q. C.—An admission in one plea where the same defendant has pleaded other and independent pleas is not sufficient to bind him. But the other defendants have not pleaded the death.

MCDONALD, J.—Should you not have pleaded the non-joinder?

McCoy, Q. C.—No; that applies to joint contracts. Cites *13 M. & W.*, 515; *Parsons on Contracts*, 11; *3 N. & M.*, 441.

Foster, contra.—The rule in this case does not cover the objection raised here. The defendants have not pleaded a non-joinder, but have gone to trial, and allowed a verdict for plaintiff by consent, subject to the construction of the note by the Court. The declaration is, on its face, a declaration upon the note in evidence.

The parties have pleaded separately, but by the same Attorney. The admission in one plea of the death of the

fourth maker should bind all the defendants. The defendants are seeking to disturb, as against law and evidence, a verdict to which they have consented. If the Court think the declaration insufficient, we should be allowed to amend.

Meagher, in reply.—There being a doubt about the construction of the note, evidence should have been given by plaintiff showing that it was meant for a joint and several note. This is not a case of non-joinder, it is a variance. The case of *Russell et al.* v. *Grant*, 2 R. & C., 409, is exactly parallel, and binds the Court here. It was re-argued last term, and the point taken here had never been raised in the pleadings, at the trial, or at the first argument, but his Lordship the Chief justice noticed it when the minutes were read, and the plaintiffs had to become non-suit.

The verdict as found is against one defendant only; it has since been altered by adding the other defendants in the verdict.

The Judge should have put it to the jury whether the note read, "we or either of us," or, "one or either of us," as we contend it is. In either case, the note bears an alteration on its face, and the plaintiff, out of whose possession it comes, should account for the alteration. If the note is, "one or either of us," it makes a several and not a joint obligation. Cites *1 Oldright*, 453, on the point that this objection has not been raised here.

Sir William Young, C. J., now, (March 12th, 1878,) delivered the judgment of the Court:—

In this case there is no defence at all on the merits. It was proved that the three defendants, together with another, signed the note in question, and the whole objection is reduced to a question of pleading. The declaration wants just one word to make it perfect. It sets out that the three defendants, "together with one John Nass," by their joint and several promissory note, promised to pay the plaintiff, &c. But the words, "now deceased," which would have made the declaration perfect, are omitted. The three defendants pleaded separately, and in the plea of George Nass he sets out the facts, including the fact of the death of John Nass. But it was argued

that we could not take the admission in the plea of one defendant to affect the legal rights of the other two; and upon that nice point of pleading the question turns. We hold that the objection is one that should have been taken by plea in abatement, and give judgment for the plaintiff, on the authority of *Stephen on Pleading*, 9th Amer. Ed., 49, and the cases there cited. See also, *1, Wms' Saunders*, 154, a.

DUFFUS ET AL. *v.* McLEARN.

PLAINTIFFS brought action as indorsees of a promissory note made by defendant, endorsed by Collie & Spencer, for whose accommodation it had been made, to C. J. Morton & Co., who endorsed it to Sylvanus Morton, by whom it was endorsed to the plaintiffs. The note was stamped to the full amount required when it came into the plaintiffs hands, but it had no stamps on it when signed by defendant, who swore that the initials on six of the nine stamps appearing on the face of the note were not his initials, and had not been placed there by his authority. He stated, however, on cross-examination, that Collie said when the note was signed that he would put stamps on it at his office. To this defendant made no objection;—and Collie swore that the initials were made by a clerk in his office on the very day the note was signed.

Held, that the note was legally stamped.*

THIS was an action by the indorsees against the maker of a promissory note, tried by Mr. Justice JAMES at Liverpool, who, after hearing the evidence, reserved the whole matter for the Court, with power to draw inferences as a jury. The main question as stated by the counsel for the plaintiff was whether certain notes given by one Sylvanus Morton to plaintiffs were given and taken in satisfaction of the note sued on here, as defendant contended they had been. There was also a question as to the validity of stamping.

Ritchie, Q. C., for plaintiff.—The note and endorsements are all proved. As to stamps, the stamps were on when he got it endorsed as the holder, cancelled by the maker's initials. In any view it would be held that defendant authorized the payees of the note to put them on. Independently of that it was double stamped as soon as it was discovered that the initials on the stamp were not those of the maker.

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* Upon the only other question in the cause, viz.; whether certain notes in evidence made by Sylvanus Morton to plaintiffs had been given and received in full satisfaction and discharge of the note sued on, among other notes, the Court, having by consent the powers of a jury came to the conclusion, under the evidence, that the defendant's note had been so paid and discharged.

McCoy, Q. C., contra.—With regard to the stamps, Duffus says himself he does not know how many stamps were on it, and that it passed out of his hands to the Bank, and afterwards remained in his possession a long while in his strong box. He says he knows there were eleven, but that he did not count them. He does not say how long afterward he discovered that it was not sufficiently stamped. It is singular that he should undertake to say how many stamps were on at that time. It was his duty when the note came into his possession to see that it was properly stamped.

John Duffus was in Liverpool, which was in commotion. Sylvanus Morton was in good standing, and universally supposed to be sound. Collie & Spencer failed, and C. J. Morton also failed. Sylvanus Morton had been a member previously, and had gone out. John Duffus proposed to Collie that if he would get Sylvanus Morton's notes for their whole indebtedness, including this, he, Duffus, would give up this and the other notes. The notes from Sylvanus Morton were given and taken in payment of this note among others, and the balance of the account paid in cash.

The fact of taking a note thus in payment may be inferred from the acts of the parties, and is a question for the jury. *2 Parsons on Bills* 160, n., 161, n.; *13 M. & W.*, 827, 58, 252; *15 M. & W.*, 23; *2 Parsons on Bills*, 217, n. The proof of the agreement is strengthened by the acts of the parties. Time was given to the indorser, and the accommodation maker thereby discharged. *6 C. & J.*, 572; *4 B. & S.*, 761. Knowledge that the note is accommodation is not necessary.

McDonald, Q. C., follows.—All the parties to this note knew that John McLearn did not owe Collie & Spencer, but that the note was merely for accommodation. McLearn was only a co-surety for Collie & Spencer, and might obtain contribution from all who knew that fact. It makes no difference in point of law what the position of the party is on the note. Duffus has made an arrangement with the principal debtors, Collie & Spencer, and with Sylvanus Morton and the last endorsees and co-sureties on the note, for an extension of time, and by that he has discharged the other co-surety, McLearn. *Byles on Bills*, 390.

On the question of fact, Morton gave his notes, taking up the note made by McLearn, Duffus taking Morton's notes and relieving McLearn. Until Morton failed Duffus never looked to McLearn. The letter to Morton in evidence, (see *post* p. 268) shews that Duffus accepted Morton's notes in substitution of all the notes on which Morton's name was. *1 White & Tudor's L. C. in Eq.*, 100; *DeColyar on Guarantees*, &c., 336.

Ritchie, Q. C., in reply.—The proposition on which we rely is, that where there is no special agreement, a note unpaid at maturity has no effect in discharging. *1 Salk.*, 124; *2 Id.*, 442; *7 Vesey*, 197; *1 Bing.*, 100; *2 C. & J.*, 405; *4 Bing., N. C.*, 9. The onus of proof that the substituted bill was paid, lies on the defendant, *3 M. & S.*, 392.

The defence set up here of co-suretyship should have been specially pleaded.

McDONALD, J.—Could not plaintiff, under his agreement, be compelled to give up the McLearn note.

Ritchie, Q. C.—No, I think not. There is no plea that the Morton notes were in substitution of the note sued on here, there is only a plea that the Morton notes were given and paid, but there is no evidence that they were paid.

The COURT.—We should have all the correspondence respecting these transactions.

(Two letters from Morton to Duffus were put in by consent.)

Ritchie, Q. C.—Argues as to the contents and meaning of Duffus's letter of 25th July, 1873, that the second proposition in it, proposing to give up the McLearn and other notes, was on condition of receiving notes in settlement of another account, not that in evidence, and also on condition that Morton should pay the Bank discounts on notes and renewals, which he has not done. Morton's own evidence is that Duffus gave up the notes with his name only on them, but refused to give up the others, saying that he had other persons on them to look to. This disproves an agreement on Duffus's part to give them up. But if there was such an agreement, the defendant has no right to set it up; he could only do so by pleading that Duffus was not the legal holder; he has not pleaded

that. There is no evidence that Duffus knew at any time that McLearn made this as an accommodation note; no evidence that Morton knew it.

If the holder of a bill of exchange accept security from or give time to a party on a bill, it is a discharge to a subsequent surety, not to a prior; *3 Esp.*, 49. (YOUNG, C. J.—Poor authority.) *Story on Bills*, sec. 429, 430; *1 M. & W.*, 374; *Redfield & Bigelow on Bills and Notes*, 581. The discharge of Morton by Duffus could not affect McLearn; only a discharge of Collie & Spencer could affect him; they were the only parties he could look to, having made the note for their accommodation.

DESBARRES, J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This suit is brought by the plaintiffs as indorsees of a promissory note drawn by defendant, payable to the order of Collie & Spencer, for $4,900, and indorsed to C. & J. Morton & Co., and by them to Sylvanus Morton, by whom it was indorsed to the plaintiffs. The defendant, among other pleas, denying the making of and the indorsements on the note, for a sixth plea, pleaded that before action brought Sylvanus Morton, one of the indorsees made and delivered to the plaintiff his promissory note for the amount due for debt or damages on the note declared on, and in full satisfaction and discharge of the defendant's liability thereon as maker thereof, and that plaintiffs received and accepted said note in full satisfaction and discharge of the defendant's liability thereon, and that Sylvanus Morton, as an indorsee, paid the note so given by defendant as aforesaid; seventhly, for a defence on equitable grounds, the defendant pleaded that he made the note for the accommodation of Collie & Spencer, and that there never was any value or consideration for making said note, or for any or either of the indorsements thereon, that the indorsements were made by the indorsees as sureties for any value given or to be given by the plaintiffs to Collie & Spencer for the note, of which the plaintiffs had due notice when it was first indorsed, and that the plaintiffs took this note on the terms that defendant and the indorsees should be liable to them as sureties, only, for Collie & Spencer, and that

plaintiffs, after the indorsement of the note to them, and while they were the holders thereof, without the consent of defendant, and for good and sufficient consideration given therefor, agreed with Collie & Spencer to give them time, and did give them time for payment beyond the time when the same was due and payable; eighthly, for a further defence on equitable grounds, the defendant pleaded, in substance and effect, the same grounds of defence as are set forth in the preceding or seventh plea, which need not therefore be repeated, and, lastly, a plea added by leave of the Court, that before action brought the plaintiffs held certain promissory notes of different persons as makers, the note sued upon in this suit being one of said notes, and upon all of which said notes one Sylvanus Morton, before action brought, made and delivered to the said plaintiffs his two certain negotiable promissory notes for five thousand dollars each, payable at different times, for the amount so due on said notes, being the full amount due thereon, the note sued for herein being one, and in full satisfaction and discharge of the liability of said defendant as maker on the note sued on herein, and the said plaintiffs received, took and accepted the said notes so made by the said Sylvanus Morton, in full satisfaction and discharge of the liability of the defendant on the note declared on.

When this cause was called for trial it was agreed by the counsel on both sides, with the consent of the parties, to take the evidence therein before the presiding Judge, to be submitted to the full bench for their judgment, with full power to decide upon the law and facts of the case. The evidence of James B. Duffus, one of the plaintiffs, and that of the defendant was accordingly taken, and further evidence was also subsequently taken by consent before a commissioner of this Court, all of which has been received and read as evidence in this cause. It was admitted at the argument by the counsel on both sides that there were but two questions for the consideration of the Court, to which our attention was mainly directed; First, was the note declared upon sufficiently stamped to make it a valid note? Secondly, did the plaintiffs accept and receive from Sylvanus Morton, one of the indorsees of said note, another promissory note or notes in lieu of and in substitution for the note declared upon, in full payment and satisfaction

thereof, with the intention of discharging and under an express promise to discharge the said defendant as maker, as well as the said Sylvanus Morton as an indorser, from all liability thereon. After carefully considering the evidence in relation to the stamping of said note, I think the first objection cannot be sustained. The witness Duffus, as one of the plaintiffs, positively swears that the note was stamped for the full amount when it came to their hands. The defendant, on the other hand, states that the note had no stamps on it when he signed it in his office and gave it to Collie, one of the payees, and that the initials on six of the nine stamps appearing on the face of the note are not in his writing, and were not placed there by his authority. But he states on his cross-examination that Collie said when the note was signed he would put stamps on it at his own office, an act for the doing of which his sanction must be implied, from the fact of his having made no objection to it at the time. Collie swears that the initials on the stamps were made by a clerk in the establishment of Collie & Spencer on the very day the note was signed, and it was forwarded to the plaintiffs on that day, having, as Duffus states, all the stamps upon it required by law. I think we may, under the circumstances, safely hold the stamping of the note in the manner described to be a sufficient stamping within the meaning and spirit of the law to make it a valid note; and the only question to be disposed of is whether the defendant, as maker of the note, is or is not discharged from his liability thereon, in consequence of the plaintiffs having agreed to take, and actually accepted from Sylvanus Morton, one of the indorsees, another or other negotiable notes in substitution for and in full payment of the note declared upon. The note last mentioned was proved to have been made by defendant and indorsed by the respective parties before named, for the accommodation of Collie & Spencer, by whom and on whose account it was transmitted to the plaintiffs, to be placed to the credit of that firm.

On the 15th April, 1873, Sylvanus Morton, having become indebted to the plaintiffs in the sum of $16,500 as an indorser of accommodation notes for Morton, Collie & Spencer, (the note sued for being one of them,) made and signed three promissory notes for $5,500 each, payable to the order of C. J.

Morton & Co., for the purpose of being endorsed and delivered to the plaintiffs, to meet his liability on all the notes so held by the plaintiffs, on which he, Sylvanus Morton, was an indorser. On the 10th July, 1873, two other notes were made by Morton, payable to the order of the plaintiffs for $5,000 each, that being the sum then remaining due to them on the three notes previously given for $5,500, each one of which having been paid had before then been delivered up to the maker. Payments were made by Sylvanus Morton, and renewal notes given from time to time, on account of the two notes of the 10th July, 1873, up to the 2nd January, 1875, when the balance found to be due thereon by Morton to the plaintiffs amounted to $8000, and for that sum, Morton, on that day, made two promissory notes, payable to the order of the plaintiffs, for $4,000 each. These notes ending all previous transactions between the plaintiffs and Sylvanus Morton, are, it seems, still unpaid, and the question is whether the plaintiffs either accepted and received the three promissory notes made to them by Sylvanus Morton for $5,500 each, or the two subsequent notes for $5,000, given in renewal of the former, as and in full satisfaction and discharge of the liability of the defendant, among others, as maker of the note sued for as well as in discharge of the liability of Morton himself as an indorser thereon. Upon this point the evidence is somewhat conflicting though not irreconcilable, and, in forming an opinion on the subject, we must be governed by the impression which the evidence, as a whole, has made on our minds, in view of the circumstances and position of the parties and their dealing with each other. James B. Duffus, in his direct examination, says he never received a note from S. Morton to cover the note sued for specially, but that he received several notes to cover advances on which Morton was an indorser. He, however, admits that the three notes given by Morton to the plaintiffs for $5,500 each, covered his whole liability on the notes the plaintiffs held, of which he was an indorser, and that the defendant's note was one of them. These three notes he says were taken after the suspension, but before the bankruptcy of Collie & Spencer, Morton Collie & Spencer, and J. Morton, all of whom were liable on the notes for which the three notes were given. He said he had no recollection of

being called upon by Morton to deliver up to him the notes for which his own notes were substituted, and did not think he had been called upon for that purpose. At the close of his cross-examination he said, without any qualification, that he never released or discharged the defendant from his liability on the note sued for, and never took any notes in payment or settlement of this note. James Collie, a witness called on the part of the defendant, in his deposition before the Commissioner, says, "I had a conversation with John Duffus, one of the plaintiffs in Liverpool, relative to the payment of the notes the plaintiffs held, the note sued for being one of them. He wished me to see Morton and obtain his notes in order to return the notes they held with his name; as near as I can remember the understanding was that he, Morton, was to get back the notes." In a subsequent part of his deposition this witness says, "I have not the least doubt Mr. Morton's notes were to be received and taken in discharge of the notes held by plaintiffs, the note sued for being one of them. John Duffus drew the notes and inclosed them in a letter, filed, (the letter marked A.) I took the notes to Sylvanus Morton to get his signature to them, and I got his signature to them. Mr. Duffus made the proposition to get those three notes for the payment of the notes held by plaintiffs, and this note, (defendant's) was included. After they were signed, S. Morton, I think, gave them to Mr. Duffus, who received them. I did not get the old notes back. I think I explained to Morton what the notes were for. The notes marked B. and C. are two of the notes signed by S. Morton and given to Mr. Duffus (being the notes dated 15th April, 1873,) for $5,500 each." At the close of his examination, this witness says, "I do not know that this note (the note sued for) was paid in cash, but I do know that it was paid by the three notes signed by Sylvanus Morton." Sylvanus Morton, another witness for defendant, proved his signature to the two notes referred to, and brought to him by Collie for his signature, marked B. and C., and a third note for the same amount of the same date, which was lost. He says, "I had a conversation with the plaintiffs in Halifax relative to the notes sometime afterwards, and then for the first time learned what the three notes were given for. I called upon them to know what I had signed

the $16,500 for. I wanted them to give me the notes for which I had given them the notes for $16,500, but I did not know who had made these other notes, or who had indorsed them. I merely gave the notes for this sum to oblige Collie, but they refused to give up the notes, and gave me a memorandum of them, and informed me it was for the notes mentioned in that memorandum I had given my three notes." On cross-examination he says, "I have had no settlement with the plaintiffs, and never requested them to apply the proceeds of the three notes of 13th April, 1873, or any portion thereof, to defendant's note. I never told the plaintiffs to apply them to any of the notes spoken of, and gave no instruction whatever. The plaintiffs have never in any way to my knowledge released the defendant from his liability on said note." Not being aware at the time, though Collie says he thought he explained to him what the notes marked B. and C. were given for, Morton could not be expected to testify whether the plaintiffs had or had not released the defendant from his liability on the note sued for. John Duffus and James Collie, who had made an arrangement which Morton had carried out, were the only persons who could speak positively on that subject. Collie has been examined under oath on this point, and, if he is to be believed, the understanding between John Duffus and himself was, that, on obtaining Morton's notes, who was then in good credit, for $16,500, the plaintiffs were to accept them in payment of the notes which they held, of the several persons named on the account marked G, among which the defendant's note was included. This evidence, if untrue, could have been contradicted by John Duffus, but he was not called upon by the plaintiffs as a witness in this case, and therefore Collie's statement, being uncontradicted, must be assumed to be true. That Morton, after giving his own notes to the plaintiffs for the full amount of all the notes they held on which his name appeared as an indorser, considered himself entitled to receive these notes from the plaintiffs as notes satisfied and paid by his own, there can be no doubt, from the language of his letter to them of 23rd July, 1873, in which he says; "I am tired of having so much correspondence about those notes. I think all the former notes should be given up, and ought to have been when I gave my notes for $16,500."

The letter of the 25th July, 1875, from the plaintiffs to Morton, in reply to that of the 23rd July, is very important. It mentions the notes held by them, and the amount of each, on which they held Morton responsible as an indorser. Among others, the defendant's note for $4,900 is named. In this letter the plaintiffs say; "If you are willing to settle the account," by which it is evident they refer to the account marked G, "as we rendered it to you, and give us your notes for the balance at three months, we will hand over these notes to you, and will renew your note to us on a small payment at maturity, provided you pay the bank discount at the time being." The notes thus demanded by plaintiffs from Morton in this letter, could have been no other than the two renewal notes for $5,000 each, which, though dated anterior to this letter, on the 10th July, 1873, in order, as it would seem, to make them correspond with the date of the account marked G, must necessarily have been made and forwarded to the plaintiffs after the date of that letter. On the transmission of these two notes to the plaintiffs for the amount they then claimed to be due upon all the outstanding notes in their hands on which Sylvanus Morton was an indorser, it became their duty, under the express promise contained in their letter to Morton of the 25th July, as well as under the promise and engagement made to and with James Collie by John Duffus, one of the partners of Duffus & Co., to deliver up and hand over to S. Morton all of these old notes, in payment of which the substituted notes are accepted, that he might have recourse to the makers, and previous indorsers for any payment or contribution he might be entitled to claim at their hands. But the plaintiffs, contrary to, and in violation of their engagements, retained all these old notes, and now seek to recover from the defendant, as maker of the note in question, the sum of $4,900, and interest, which, if it be an existing debt, must, as I take it, be due to Sylvanus Morton, whose notes they accepted in payment, and not to them.

After consulting all the cases cited at the argument, and a careful consideration of the evidence on both sides, I have arrived at the conclusion that, upon the law and facts in this case, the plaintiffs are not entitled to recover on the note sued for and that the judgment of the Court ought to be for the defendant.

FOSTER ET AL. *v.* LAMIE.

DEFENDANT, by letter dated at Sydney, C. B., asked the plaintiff to send him a specified quantity of liquor *in bond*, which plaintiff accordingly did, executing a bond in the usual way under the Customs Act of 1867, conditioned to deliver the goods without alteration or diminution at the Port of Sydney, within ninety days. The goods were shipped under a bill of lading by which the master undertook to deliver them at the Port of Sydney Bar, which although in the same harbor, is a different port from that of Sydney. The goods were never entered, and plaintiffs were obliged, under their bond, to pay the duties.

Held, that the request of the defendant in his letter was to be understood as a request that plaintiff should enter into the bond; that plaintiff could recover on a count for money paid, without proof of any subsequent request, and that it was no objection that the bill of lading made the goods deliverable at Sydney Bar, as the defendant could have paid the duties at Sydney and had them landed at the Bar.

At the trial the cause was continued a day to enable plaintiff to get a deposition which could not be found.

Held, that this was no objection to the verdict for plaintiff, as the Judge had discretion under R. S., cap. 94, sec. 210.

THIS action was brought to recover the amount of certain duties paid by plaintiffs on goods shipped in bond by them from Halifax to the defendant at Sydney, Cape Breton, for which, plaintiffs alleged, they had become bound to Her Sovereign Lady the Queen, for the defendant and at his request.

The cause was tried before Mr. Justice SMITH, at Halifax, in May, 1877, when a verdict was found for plaintiffs. A rule *nisi* to set aside this verdict, on the ground, among others, that a continuance had been improperly granted by the Judge, was argued February 21st, 1878, before YOUNG, C. J., and MCDONALD, SMITH, and JAMES, J J.

Weatherbe, Q. C., in support of rule.—The Judge granted a continuance from one day to the next, to allow the plaintiffs to obtain a deposition alleged to have been taken in Cape Breton and lost. The contrary course was taken in *McIlreith* v. *Murray*, and sustained by the Court. As to the bond made by plaintiffs, cites *L. R., 1 C. P.*, 501. The clerk was not authorized to execute the bond here. The making of the bond by plaintiffs was a voluntary act on their part, not requested by defendant. The plaintiffs have not declared specially that they executed this bond or paid the money at the request of defendant. As to execution of the bond, see *Dom. Acts of 1867*, p. 187. The goods were shipped for Sydney Bar, (or North Sydney,) while the bond was for the pay-

ment of duties on entry of the goods at Sydney, (or South Sydney), which is a different place altogether.

Rigby, Q. C., contra.—As to the continuance, it was shewn before the Judge that the deposition had been seen in the Prothonotary's office a day or two before the trial, but was not to be found when wanted. The bond and its execution are in the form and mode prescribed by the statute. There is an implied request on the part of the defendant to plaintiffs to sign a bond for him, as there is a letter in evidence in which defendant requests plaintiffs to ship him the goods "in bond;" *8 T. R.*, 308. There is a count specially setting out the facts.

As to the question of the different ports, the plaintiffs wrote the defendant, who had written from "Sydney," to forward a certificate from "the customs officers at his port." The fact of the goods being shipped to Sydney Bar would not prevent their being entered at Sydney. The Court should take judicial notice of the fact that the ports are only *five* miles apart. The defendant does not complain of breach of contract by plaintiffs, as he forwarded the money for the goods.

Weatherbe, Q. C., in reply.—The defendant, according to the evidence, paid for the goods before receiving them. *3 A. & E.*, 331.

McDONALD, J., now, (April 1st, 1878), delivered the judgment of the Court—

On the 16th day of December, 1872, the defendant addressed a note to the plaintiffs, dated at Sydney, C. B., asking the latter to send him a puncheon of rum and two quarter casks of gin, *in bond*, which they accordingly did. The plain meaning of that letter was a request that the plaintiffs should send to the defendant the goods mentioned, charging him with the price, less the duty which by law would have to be paid at Sydney by the defendant before he could legally dispose of the property there. It cannot be denied that when he asked that the goods should be sent to him in bond, he meant that the plaintiffs should become liable, at his request and for his use, to fulfil the condition of the bond; nor can it be said that the plaintiffs did not so understand him.

The bond was accordingly executed by the plaintiffs in the usual way under the Customs Act of 1867, and conditioned to deliver the goods without alteration or diminution into the custody and possession of the proper officer of the customs at the Port of Sydney, within the space of ninety days. On the 20th December, the goods were shipped by a vessel called the "*Eusebia*," under a bill of lading by which the master undertook to deliver them to the defendant at the Port of Sydney Bar, which, although in the same harbor, is a different port from that of Sydney. On the 21st of the same month the plaintiffs wrote to the defendant enclosing the bill of lading and a customs certificate which they asked the defendant to get signed by the customs collector "at your port" and return it in order to cancel the bond which they gave at Halifax.

At the argument, a letter was read by consent, by which it appeared that on the 30th day of January, 1873, Lamie remitted $142.47 to the plaintiffs, that being the invoice price of the goods, after deducting the authorized discount. In that letter the defendant stated that there was no sign of the vessel arriving at Sydney that winter,—that the goods were not landed,—that he could not get the certificate signed,—that he did not know how there could be any trouble,—and that he would get the certificate signed as soon as the goods were landed at Sydney Bar in the spring. It was proved that the goods were not entered according to the bond, and the plaintiffs were obliged to pay the duty—$215, and they now seek to recover the amount from the defendant in this action.

The declaration contains a count, specially alleging that the defendant is indebted to the plaintiffs for duties paid by the latter for the former on certain dutiable goods forwarded to him from Halifax to North Sydney, and for the payment of which the plaintiffs became bound to the Queen, on behalf of the defendant, and at his request. There is also a count for money paid, &c.

The first two pleas, and the last, deny the plaintiffs' allegations; the third sets forth that the plaintiffs were not damnified; and the fourth says that they were damnified in their own wrong. The plaintiffs proved the facts as here stated, but the defendant called no witnesses, and a verdict was given, by

consent, in favor of the plaintiffs, for $215, subject to the opinion of the Court.

At the trial, the deposition of Mr. Leonard, which had been in Court a short time previously, could not be found, and the cause was continued till the following day to enable the plaintiffs to get it. This was made a ground of objection to the verdict, but I fail to see the force of it. Sec. 210, chap. 94, R. S., gives the presiding Judge the power here exercised, and in this case it was wisely used, as the result shows.

Objection was taken to the declaration, but I cannot see the force of such objection; because, independently of the special count, I am of opinion that, under the evidence, the plaintiffs were entitled to recover upon the count for money paid for the defendant at his request.

The plaintiffs' obligation to enter the goods at Sydney, or pay the duty there, was not a primary liability to be performed on their part, as in the case of *Spencer* v. *Parry*, 3 Ad. & E., 331, but one which they incurred at the request of the defendant and for his benefit. *England* v. *Marsden*, L. R., 1 C. P., 529, was cited on behalf of the defendant, but this case is very different from that, because there the liability of the plaintiff to pay the money was not incurred at the request or for the benefit of the defendant; here it was. It would be difficult to find the distinction better drawn than in that case, as it is distinguished from *Exall* v. *Partridge et al.*, 8 T. R., 308. In the last mentioned case the defendant was a coach-maker, and the plaintiff, at his request, bailed his carriage with him. The landlord distrained it for rent and Exall paid the amount. It was held that he had a right to recover under the common count, because the carriage was left on the defendant's premises, at his request, and for his benefit. In *Brittain* v. *Lloyd*, 14 M. & W., 762, it was held that an action for money paid may be maintained in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it. In order to maintain an action for money paid, it is not necessary that the defendant should be relieved from a liability to a third person. *Lewis* v. *Campbell*, 8 C. B., 541. In *Garrard* v. *Cottrell*, 10 Q. B., 679, the

plaintiff, having accepted a bill for the defendant's accommodation, defended an action by the endorsee, and finally paid the amount with costs of the action. He brought an action for money paid, and the Judge directed that if the defendant had directed the plaintiff to undertake the defence, the costs were recoverable as money paid to the defendant's use. It was held that the direction was right and the money recoverable under the count for money paid, although no express request was proved.

In this case it is quite clear that it was at the request of the defendant that the plaintiff executed the bond in question, by which he assumed the legal obligation of paying money for the use of the defendant. In such case it is not necessary to prove a subsequent request to pay the money; *Sleigh* v. *Sleigh*, 5 Exch., 514. If Lamie had not requested the plaintiff to send the goods *in bond*, the latter would, of course, have paid the duty, added the amount to the invoice price, and charged the whole to the defendant. The course adopted was not only at the request of the plaintiff, but for his use and benefit as well. Otherwise why should he have given the instructions contained in his letter?

It is said, however, that inasmuch as by the bill of lading, the goods were to have been delivered to Lamie at Sydney Bar, and the bond was conditioned to enter them at Sydney, the plaintiff cannot recover; but I must confess that I cannot concur in that opinion. There could be no difficulty in the way of the defendant paying the duty at Sydney and getting the goods landed at the Bar, if he had been disposed to act fairly in the premises. He did not show at the trial that he did not get delivery of the goods. Is there any doubt that he did receive them? If he did, when and where? We hear nothing of the loss of the vessel or cargo, nor of a claim having been made against the master or owner for non-delivery. If by any casualty the property had been lost or destroyed before arriving at Sydney a representation of that fact should have been made to the proper authority; but there is no evidence of such loss or destruction, and the irresistible inference is that the goods came into the possession of the defendant, who now seeks to evade an honest liability upon alleged

technical grounds, which, however, are not sufficiently technical to be a legal defence.

The objection that evidence was improperly admitted is without foundation, and I am of opinion that the rule *nisi* to set aside the verdict must be discharged with costs

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McDONALD *v.* MITCHELL ET AL.

A RULE returnable on the first day of term is the same as a four day rule and must go on the docket, unless special circumstances are shown.

Judgment was taken for plaintiff in January, 1874, on a promissory note of defendants to one Steadman, endorsed to plaintiff, who issued an execution, and afterwards assigned the judgment to Steadman, by whom a second execution was issued. Defendants sought to have this execution set aside, on the ground that the judgment had been taken in violation of a settlement with Steadman, who had agreed to accept, and had received a mortgage in full payment. The evidence was conflicting, and the Court, holding that there was no foundation for the doctrine of merger, which had been suggested, discharged the rule *nisi*, with costs.

IN this cause a rule *nisi* was granted, returnable on the first day of the present term, to set aside an execution issued upon a judgment which had been taken upon a promissory note of defendants indorsed to the plaintiff. The execution which defendants sought to stay was issued by the assignee of the judgment.

On the first day of the term, *Meagher* moved to make the rule absolute.

Rigby, Q. C., objected that the case was not on the docket.

The COURT *per* YOUNG, C. J.—It is a rule returnable on the first day of term. That is the same as a four day rule, and must go on the docket unless special circumstances are shown. If it were otherwise, it would have an unfair precedence.

The cause was afterwards entered upon the docket, and taken up in its order.

Meagher, in support of motion.—The party seeking to enforce this judgment took a mortgage covering the note sued on in this suit, merging the debt in a speciality debt. *L. R. 7 Eq.*, 573; *10 C. B.*, 560. The mortgage gave the defendants two years to pay the debts; this suit was brought and judgment entered within three weeks.

Rigby, Q. C., contra.—The party seeking to enforce this judgment swears that he took the mortgage merely as collateral security for the debts, and not in satisfaction of them, —that the mortgage was not such as was first agreed to be given, and was not accepted in fulfilment of the first agreement.

Sir Wm. Young, C. J., now, (April 1st, 1878,) delivered the judgment of the Court:—

In January, 1874, a judgment was taken in this case for a promissory note of the defendants to Enoch Steadman for $236, indorsed to the plaintiff, with interest and costs, on which an execution was issued. The judgment was then assigned to Steadman, by whom a second execution was taken out and levied on defendant's lands, and a rule *nisi* was granted to set it aside on two affidavits of the defendant and his son William, alleging that the judgment was signed in violation of good faith and of a settlement made in November, 1873. An affidavit of Steadman's was produced in reply, and the statements in these affidavits, which are the only evidence before us, essentially vary. Steadman held five notes of the defendant and his sons William and Alfred, amounting in all to $770, and there was also a book account of $112. The note for $236 was one of the five, and the defendant says that he offered, and Steadman agreed to accept, a mortgage from himself and his son William in payment of all their liabilities. The mortgage was to cover a new sawing-mill, of which the defendant owned a third and his son William also owned a third, and also a lot of land called Mark's Gore lot.

A copy of the mortgage is produced by Steadman, and it turns out to be a mortgage for $1379, and neither party affords any explanation of the difference between this sum and the items stated in defendant's affidavit. It conveys also his thirds, not of the whole, but of the eastern half of the new mill, and a lot of land, as Steadman says, different from what was promised him, and much less valuable. He says also, that a bond mentioned in the mortgage was never delivered to him, and there is no covenant for payment.

As both these parties are said to be respectable men, we must conclude that they have given us an imperfect history

of these transactions, which, if it were thoroughly known, might perhaps reconcile these contradictions. The mortgage has been foreclosed, and Steadman bought the premises at the sale for $470, which he thinks more than they are worth. It is obvious that there is no foundation here for the doctrine of merger which was suggested at the argument, and that the rule *nisi* must be discharged with costs, including the cost of advertising.

McDONALD ET AL. *v.* DOULL.

PLAINTIFFS' written application for marine insurance, made October 17th, 1870, to the St. Lawrence Marine Association, of which defendant was broker, and in which he was a shareholder, contained the following statement; "Insurance elsewhere not to exceed $2,000." The application was accepted Oct. 25th, 1870, and a policy delivered to the plaintiffs' agent, containing no prohibition against insurance elsewhere. The vessel was insured in other companies to the amount of $4,000.

Held, that the statement in the application or slip was a positive representation of a future fact material to the risk, and that, being false, it avoided the policy.

THIS was an action on a policy on the schooner *Nimrod*, issued by the St. Lawrence Marine Insurance Association at Pictou. The questions presented for consideration came before the Court on a case agreed upon by plaintiffs' and defendant's counsel, all the material portions of which are set out in the judgment of the Court, *post* p. 278, (q. v.)

The cause was argued before YOUNG, C. J., and DESBARRES and SMITH, J J., February 26th, 1877.

Henry.—The contract is embodied in the policy which contains no prohibition against further assurance. The slip containing the application puts the insurers in no better position than if the assured had orally stated that he would not take out any further insurance. The law treats the application as a mere letter or conversation; it is mere *parol* evidence; the contract is finally embodied in the policy. *Arnould on Insurance*, 70, 87; *7 C. & P.*, 597. The Company, by their policy, waive the stipulation in the slip that he would not take out extra insurance. *11 A. & E.*, 589: *2 Sumner*, 567; *3 Kent's Com.*, 258-9; *1 Duer*, 158.

It is perfectly consistent that after the application the insurers were willing, from what they learned of the character of the vessel and owners, to waive the stipulation as to extra insurance. *1 Parsons on Insurance*, 108; *4 Hill*, 330. In this case a verbal stipulation was made by the assured, on making his application, that he would discontinue the use of a certain fire-place in his house, and the violation of that stipulation, not inserted in the policy, was held no defence to an action for loss under the policy. Cites also, *L. R., 8 Eq.*, 368.

As to the cancellation, the insurers charge the assured for keeping them insured up to a certain date. It is not a cancellation of the contract for insurance, *ab initio*.

The underwriters, in their case here, have stated that they cancelled the policy only after 20th February, 1871, subsequent to the loss.

Meagher, contra.—If the stipulation as to insurance was not part of the contract, in the apprehension of the assured, why did they agree to the cancellation of the policy? The authorization from plaintiffs for the cancellation of the policy is unconditioned. The cancellation makes the policy as if it had never been issued. See *18 C. B.*, 98, referred to in *Arnould*. 259–60–61. The application here was a promissory representation, much in the nature of a warranty; *Arnould*, 482, 499, If the policy had contained any reference to subsequent insurances, the case would be different; but this policy does not contain a word inconsistent with the slip.

With regard to the application slip, see *L. R., 6 Q. B.*, 385; *L. R., 7 Q. B.*, 517; *L. R., 9 Q. B.*, 577; *1 Camp.*, 530. The distinction between a representation and a warranty is pointed out in *Arnould*, 477. See *6 C. B., N. S.*, 657; *Parsons*, 402, 408, 417, 429; *3 Bligh's H. of L.*, 402; *1 Russell & Chesley*, 50. The policy could be reformed to conform to the slip. If the assured is in an awkward position, it is his own fault. He has taken out $2000 more than he promised.

Henry, in reply.—The case in *6 C. B., N. S.*, is in our favor. The case turned upon the fact that the loss was subsequent to the cancellation, the opposite of this case. The con-

tract contained in the slip is merged in the contract contained in the policy. The defendants certainly could not ask to have the policy reformed which they themselves issued. Suppose the application said the vessel was not to "deviate," and the policy contained no such stipulation, could the defendants plead a deviation? Is not the fact that the defendants have expressly and carefully stated that their cancellation was from and after the 20th February, and the charging of premiums up to that date, an admission of their liability for loss before that date?

SMITH, J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This is an action brought on a policy of insurance issued by the St. Lawrence Marine Association at Pictou, Nova Scotia, on the 25th of October, 1870, on the schooner *Nimrod*, owned by the plaintiffs, for the period of twelve months, for the sum of $2,000. A case was agreed upon by plaintiffs' and defendant's counsel, and submitted to the Court, and argued during the present term. The facts as presented to us are as follows:—

On the seventeenth day of October, A. D. 1870, the plaintiffs, by their agent at Pictou, John R. Noonan, applied in writing to the St. Lawrence Marine Association, an incorporated partnership of which the defendant was broker, and also one of the shareholders, for insurance to the extent of $2,000 on a schooner called the *Nimrod*, belonging to the plaintiff, a copy of which application is annexed to said case.

The said Association, by the defendant as their broker, by a memorandum written under said application, offered to insure the said schooner at the rate of fourteen per cent., two and one-half off if no claim should be made for loss, which offer was accepted by the plaintiffs' agent, on the 25th day of said month of October, and on the same day the policy set out in the declaration herein was issued by the said Association and delivered to the plaintiffs' agent, who also delivered to the defendant the customary premium note for the premium under the policy payable twelve months after date. On the same day, the 25th of October, the plaintiffs, by their said agent,

also insured the sum of $2,000 on their said schooner *Nimrod*, with the Mutual Marine Insurance Association of Picton, and on the second day of November of the same year, Messrs. Black Bros. & Co., the plaintiffs' agents in Halifax, insured for the said plaintiffs, and under their instructions, in a further sum of $2,000 on said schooner with the Union Marine Insurance Company of Nova Scotia at Halifax, both of which last named insurances were in force at the time of the loss of the said schooner, which occurred from a peril insured against under the several policies. Before any intimation of the loss of the schooner had been received by the owners, or their agents in Nova Scotia, the defendant's company having been for the first time made aware of the said schooner being insured to the extent of $4,000, in addition to the said insurance in the defendant's company, the said last named company thereupon notified the plaintiffs that such insurance was in excess of the amount to be insured on the said schooner elsewhere in the application for insurance originally made to the defendant's company, whereupon the plaintiffs desired that the defendant's company, notwithstanding the fact, should allow the insurance to remain on said schooner, which the defendants refused to do, whereupon the plaintiffs, by their said agent, John R. Noonan, on the 20th day of February, 1871, directed the said defendant, as broker of the said St. Lawrence Marine Insurance Association, to cancel the said policy of insurance set out in the declaration herein, in consequence of which the said policy, from and after the 20th day of February, was duly cancelled at a meeting of the directors of the said Association held on the said day, and the premium of insurance on said policy was charged to the plaintiffs by the company up to the time of such cancellation. Annexed to said case is an account in the handwriting of the defendant, given to plaintiffs by him at the time of the said cancellation. The opinion of the Court is sought upon these facts as to defendant's liability upon the loss of said vessel.

The application above referred to, and upon which it is admitted the policy issued, contains a statement as follows: "Insurance elsewhere not to exceed $2,000." It is contended on behalf of the defendant that the said defendant, who is sued as one of the shareholders of the Association, for his pro-

portion of the insurance as set out and claimed, is not liable on two grounds;

First, that the plaintiffs insured the said schooner in two other offices for the sum of $4,000, being $2,000 in excess of what they represented in their application that the schooner was to be insured for outside of the defendant's office.

Secondly, that the cancellation of the policy "from and after the 20th day of February, 1871," as mentioned in the case, but not in the letters annexed thereto, had the effect of destroying the policy *ab initio*, and relieving the defendant from liability for the loss of the vessel which occurred previous thereto, unknown to both parties at the time of the said cancellation.

It will be proper, and perhaps necessary, in the first place, to consider the force and legal soundness of the first ground taken by the defendant, for if this ground can be sustained, it will clearly be unnecessary to give a decision on the second. It was strongly urged at the argument by the plaintiffs' counsel, Mr. Henry, that as the policy issued after the application, or slip, as it is frequently, in works on insurance, technically termed, made no reference to the statement or representation relied on, and consequently formed no part of the contract culminating in the policy, we should be violating a fundamental principle of law, in admitting a memorandum made while negotiations were going on to control and vary the written contract. While I am quite prepared to concede the correctness of the principle contended for, that no *written* memorandum passing while negotiations are proceeding can be used to vary the final agreement any more than *oral expressions*, I cannot regard it as applicable to this case. If the representation or statement contained in the slip in question was sought to be relied on as a warranty, then, beyond all question, it must have appeared in the policy. But I do not comprehend that this is at all the position taken by the defendants, or that they are seeking to use the slip in any way to control or alter the language of the policy. The cases are too numerous to permit of such an attempt.

In *Parsons on Insurance*, p. 110, will be found an exhaustive *résumé* of the authorities on the point. In *MacKenzie* v. *Coulson*, L. R., 8 Eq. 368, already cited in this Court in *Wylde et al.* v.

Union Marine Ins. Co., 1 R. & C., 205. SIR W. JAMES, Vice-Chancellor, carried the doctrine to a great length; but in the case before us such a question is not involved. We are simply to enquire whether there has been such a false *representation* made by the plaintiffs to the defendants, on a material fact which there is just reason to believe either determined the underwriter to insure, or influenced his estimate of the premium. *Vide Arnould on Insurance*, 493; *Marsh, Ins.*, 449; *1 Phillips, Ins.* No. 525, 256; *Duer on Representations*, 71. *Arnould*, on the same page, says; "It is not necessary that the representation should be directly as to the state or condition of the subject of the proposed insurance; it is enough that it reasonably did exert, or might reasonably be presumed to have exerted an influence over the mind of the underwriter in determining him to assume a responsibility he would not otherwise have done." And he cites *2 Dow's P. C.*, 263, which I have been unable to obtain. It can hardly be said in this case, I imagine, that when the printed form of the application from the defendants' office requires a representation that the insured will not insure "elsewhere" to an amount exceeding $2000, the vessel being valued in the policy and slip at $4800, and such a representation is made, it would not "reasonably exert, or be presumed to exert, an influence over the mind of the underwriter in determining to assume a responsibility he would not otherwise have done." I can easily understand the importance which underwriters, (so frequently imposed upon,) would attach, in estimating the premium they would ask in assuming a risk, or in considering whether they would assume it at all, to the extent of the insurance effected on a vessel as proportioned to her value.

To remove the temptation which obviously would be offered to defraud the underwriters by unprincipled parties, I can readily understand this representation to be required, and I can conceive no more reasonable and legitimate one. If, then, the representation we are considering was material, as I hold it to be, then can the slip be used for the purpose of establishing it. I have no doubt whatever that it can, without in the most remote degree violating or destroying any well-recognized law of evidence. In *L. R., 6 Q. B.*, 674, it is decided that if a representation be made by the insured to an under-

writer, however honestly and innocently, that a ship is new, when in fact she is old, the policy will be vitiated, and that the slip may be received in evidence to prove it. This decision was appealed from and affirmed; *L. R., 7 Q. B.*, 517. KELLY, C. B., in delivering judgment, when referring to the admission of the slip in evidence says; "For many purposes it may legitimately be used, as in cases where a fraud is suggested, or where there is a plea," as here, "of misrepresentation, the slip may be evidence of the fraud or misrepresentation charged."

It now remains to be considered, in reference to the first ground of defendants' contention, whether this is a positive representation of an existing fact, or a promissory one, having relation to an act to be done in the future, and if the latter, does it, not having been performed, avoid the policy. *Arnould*, 482, in referring to positive and promissory representations says, "the distinction is more of form than substance." It first appears to have been taken in *Flinn* v. *Tobin*, M. & M., 367, before Lord TENTERDEN at *Nisi Prius*. In a subsequent case, *Flinn* v. *Headlam*, 9 B. & C., 694, involving the same facts, it was held that the underwriters were not relieved by a representation of a fact to exist in the future. This is clearly not the law at the present day, nor do I see why on principle it should be. *Arnould*, p. 484, thus lays down the doctrine; "The principle equally applies to the case in which the insured falsely, though not fraudulently, affirms in positive terms, that some material fact shall or will hereafter exist. On principle, therefore, there seems to be no ground for this distinction, and, also, it is quite irreconcileable with authority;" and he cites numerous cases in support of this position, one of which is so strongly in point that I will briefly notice it. In *Edwards* v. *Footner*, 1 Camp., 530, the broker, a week before the policy was signed, stated that the vessel "was to sail with the *Hopewell* and *Young Roscius*, both armed ships, and she was herself to carry *ten guns* and *twenty-five men*." There was no evidence of any conversation on the subject having passed between them when the policy was signed, or in the intervening period. In fact the vessel sailed by herself and carried only ten guns and seventeen men. It was there contended that what was said by plaintiff could not

be considered a representation as a *representation* which the assured was bound to comply with, as the slip was not evidence of the contract, and the Court could only look at what took place when the policy was subscribed; but Lord ELLENBOROUGH held that the statement having been made when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured. Judge DUER in his treatise on insurance has, in vol. II., 741–2–3, collected the American cases on the subject in support of the same principle.

Arnould in concluding his review of this branch of insurance law, p. 485, says; "It may, therefore, be safely laid down, as the conclusion to be derived from all the authorities, that the positive representation of a future fact, material to the risk, will, if false, avoid the policy though it may not be morally fraudulent." See also *Dennistoon et al.* v. *Lillie*, 3 Bligh, H. of L., 202, which is an explicit authority to this effect. Regarding the principle as too well settled to be now questioned, I am of opinion that, upon this ground, without even hazarding a *dictum* on the *ex post facto* effect of the cancellation of the policy, the consideration of which, perhaps, might have created some difficulty in the defendant's way, judgment must be for the defendant.

SMITH *v.* McDONALD.

In order to acquire a right of way by enjoyment for twenty years, it must be proved that the claimant has enjoyed it for the full period required, *as of right*, and if there has been unity of possession for all or any part of that time the claimant will not have enjoyed *as of right* the easement, but the soil itself. A defence on this ground to a claim of right of way, is sufficiently put in issue by a plea that the claimant is not entitled to such right of way, as alleged.

Quære, whether a tenant at will has such an estate as will entitle him to sustain an action for obstructing a right of way.

THIS was an action for obstructing a right of way, tried before McCULLY, J., at Windsor, in September, 1876, when a verdict was found for the plaintiff for $40. The cause came before the full Court last term, on a rule to set aside the verdict.

McDonald, Q. C., for rule.—Plaintiff has shown no right, only an agreement for a deed which confers no right. The *termini* are not shown. There is no evidence of user to create a right. The cause rests upon user.

In *Tupper* v. *Campbell*, 2 R. & C., 68, I was seeking to justify Tupper's right of way. I did not prove the deed from Gourlay to Tupper, and it was held fatal. *1 B & S.*, 571; *Ib.*, 761. *Washburne on Easements*, 38, 40, 41. The plaintiff has proved that he was there only under a bond.

There is no evidence of a continuous user. James Foley admits that he used by consent. He says; "he used mine and I used his." There is no adverse claim on the part of the Foleys. *Washburne on Easements*, 134, 136. He made the road when he had a right and sold it to Crane. Where is the evidence that after that sale he held the right of way adversely and continuously? Using it with permission is fatal. *Washburne on Easements*, p. 25.

Thompson, contra.—The case of *Tupper* v. *Campbell* does not affect this case in the least. The party was unable to connect himself with the owner of the dominant estate, and had to rely on his own user. Here he is connected with the dominant estate. He was at any rate a tenant at will of the owner. and that is sufficient to connect him with the user of his landlord. The Judge told the jury that the tenant at will could not prescribe. The tenant at will can maintain action for the interruption of right of way; *2 Allen, Mass.*, 135. That case is similar so this. There was a right of way appurtenant to the land when sold to plaintiff, by twenty years user of Foley, who sold to plaintiff. They have not put us to the proof of title. The pleas only deny the existence and the obstruction of the right. The tenant of the owner of the dominant estate can tack the user of his landlord to his own. Foley says; "the road was a privilege for my brother's property and mine." Cites *1 Washburne on Real Property*, 584, and *Roscoe's N. P.*, 102, to show that the tenant at will can bring the action. I contend that we can tack the possession of a tenant at will to that of his landlord, or any tenant, even a tenant at sufference, only that the latter could not himself bring action. *3 Cruise Dig.*, 100; *4 B. & C.*, 583; *4 Metcalf*, 224; *1 R. & C.*, 315.

McDonald, Q. C.—I admit that a tenant at will can exercise any rights that the land gives him, but a man may be in possession of land under an agreement to purchase, without being a tenant at will. A tenant has a higher right than that. I buy a farm, with a month to pay for it. At the end of the month the owner can give notice, but suppose the tenant cuts timber, is he not a trespasser? (McDONALD, J.—Is there anything to show that the agreement had expired?) No, it makes no difference. He is not a tenant at will unless the period has expired. There can be no tacking of the user by the tenant at will to that of the owner. There was merely a mutual permission granted to use the way. Cites *2 Washburne on Real Property*, 301, 341.

SMITH, J., now, (April 1st, 1878), delivered the judgment of the Court:—

This cause was tried before the late Mr. Justice McCULLY, at Windsor, where a verdict was given for the plaintiff, and a rule was granted by the learned Judge to set the same aside, which was argued before the Court during the last preceding term.

It is an action for the obstruction of a right of way. As appears by an abstract of the pleadings furnished at the argument, the plaintiff sets out in his declaration that he was possessed of a messuage and was entitled to a right of way from the said messuage over a certain close to the Basin of Minas, and back again from the said Basin of Minas over the said close to the said messuage for himself, &c., &c.

The defendant pleads:

1. That the plaintiff is not entitled to the said right of way, as alleged.

2. That defendant did not obstruct the said right, as alleged.

The whole question in the case is raised by the first plea, viz.; whether the plaintiff, under the evidence, is entitled to the right of way, as claimed by him.

Certified copies of two deeds were put in at the trial by plaintiff, one from William Foley to John E. Crane, January 4, 1853; the other from James Foley to said Crane, dated the 28th day of February, 1854. I cannot quite understand the

object, or materiality of this documentary evidence, as it conveys no title whatever to the plaintiff, but merely, as the learned Judge says in his charge to the jury, "conveyed a portion of the premises to Crane," through whom the plaintiff does not claim. McDonald does not rely upon any title, but contents himself, both in his pleadings and at the trial, at which he produced no testimony, with resisting the plaintiff's legal claim to the right of way. It is true that the plaintiff says defendant purchased from Crane, and went upon the land some two years before the alleged obstruction, and that the road went over his land. But there was no documentary title offered on the part of defendant, nor was it perhaps necessary for him to do so. Neither has the plaintiff any title to the land appurtenant to which the right of way is claimed. He is merely a tenant at will to Mr. Foley, in whom the legal estate is vested, as he tells us in his evidence, by purchase from Benjamin DeWolf. It is true he is in possession under an agreement to purchase from Foley, having paid a portion of the price, but without deed, and, consequently, without legal title,—a mere tenant at will.

It was urged at the argument that a tenant at will had not such an estate as would entitle him to sustain an action for obstructing a right of way, although existing as appurtenant to the soil in his possession. This view the learned Judge, in his charge, acquiesced in. I have much difficulty in bringing my mind to a conclusion on this point. It certainly seems to be laid down by some very reliable authorities, that a right of way cannot be prescribed by a mere tenant at will. *Blackstone*, in his commentaries, vol. 2, 264, says; "a tenant for life, for years, at will, or a copy-holder, cannot prescribe, by reason of the imbecility of their estates. A prescription must always be laid in him that is tenant of the fee." *Washburne on Easements and Servitudes*, 129, lays it down that "a tenant at will, or for years, cannot prescribe for a right of way, but it must be done in the name of his landlord, the tenant of the fee."

In *Washburne on Real Property*, page 582, sec. 2, the same principle is thus recognized; "A tenant at will could not prescribe for a way, or other easement, as appurtenant to the premises held by him, by reason of the inadequacy of his own

estate." It may be a question well worth considering, should this point come up for solemn adjudication, which it does not now, in the view I take of this case, how far the recent English enactments, *2 & 3 Will.*, 4, and our Provincial Act on the subject of limitations copied from it, may lessen the rigor of a law so purely technical, and based upon a presumption extending back over so lengthened a period, which could hardly apply to this country. The case of *Skull et al.* v. *Glenister et al.*, 16 C. B., N. S., 80, certainly, to a considerable extent, conflicts with the authorities I have referred to. It was there held that a right of way appurtenant to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise; and in this case there was no evidence to shew the nature of the tenancy, except that he was to pay £1 per year. There certainly there was no tenancy at will, yet there was at most but a yearly hiring of the land which, according to *Blackstone* and *Washburne* would be an inadequate estate upon which to prescribe a right of way. Had the right clearly and legally been shewn to have existed in William Foley when the plaintiff was put in possession, I should have had much hesitation in deciding that he could not have recovered on this ground.

This case, however, does not, as I have already stated, require a decision of the Court upon this point, because as I regard the evidence and the law, the plaintiff has failed to shew that the right of way claimed by him existed in Foley at the time plaintiff purchased and went into possession. The evidence is of a most unsatisfactory character, as furnished by his Lordship's minutes, and far from being of that strong and perspicuous nature which would, in my apprehension, either at common law or under our statute, be required to establish a right of way over another's land. Upon the construction of the English statute numerous decisions have established that, in order to acquire a right of way by an enjoyment for twenty years, it must be proved that the claimant has enjoyed it for the full period required, and that he has done so "*as of right*," and that if there has been unity of possession during all or part of the time, the claimant will not have enjoyed, as of right, the easement, but the soil itself. Unity of possession disproves the enjoyment of the easement as such. *Roscoe's*

N. P. Ev., 769; *Onley* v. *Gardiner et al*, 4 M. & W., 496. In this case the Court held that, to entitle a party to a right of way under the statute, the easement must be enjoyed *as such*. PARKE, B., says; "A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road." See also *Bright* v. *Walker*, 1 C. M. & R., 211. And in *Beasley* v. *Clarke*, 2 Bing., N. C., 708, it was held that it was clear that a unity of possession at any time during the twenty years is a denial of the plaintiff's enjoyment as of right for that purpose. The pleadings in this case fairly and legitimately raise a defence of this kind. It was decided in the case of *Monmouthshire Canal Company* v. *Harford*, 1 C. M. & R., 631, and confirmed by the Court of Queen's Bench in *Tickle* v. *Brown*, 4 Ad. & El., 382, that proof of unity of possession is admissible under a traverse of right of way.

Now let us examine the evidence upon which the plaintiff relies to establish an uninterrupted enjoyment of the way as of right for the period of twenty years. The plaintiff says; "I own a property purchased eight years ago,—lived there ever since; was never obstructed by any man but defendant; know the defendant two years ago last spring." There is no precise date given when the first obstruction on the part of the defendant took place, nor can I find any proof of the date of the issuing of the writ; but it would seem that he had been in possession about six years before the cause of action arose. The principal evidence as to the period during which the easement was enjoyed is that of William Foley and James Foley. The former says; "I bought of Squire DeWolf. I lived twenty years *or so* upon it. Not far from thirty-eight years since James Hiltz occupied as a tenant of mine. I made the road from my barn to the shore, perhaps, three months after I went."

This is the entire evidence of plaintiff as to the period he used the road over which the easement is claimed. Now let us see what James Foley says on this point; "I once lived on the farm, my brother and I occupied together. I occupied fifteen years. When a boy I went to work on the road. We repaired it a piece. *We* repaired it;—a piece made before we went.—We made it up to the barn,—there it ended. The

road was a privilege for my brother's property and mine." On cross-examination he says; "My brother and I once occupied both lots jointly, after, separately."

William Foley also says; "*I rented the two lots defendant now has two years before.*" There is no evidence of the length of time this joint occupancy or unity of possession extended over. James Foley says, "I occupied fifteen years." But that a joint possession of the enjoyment of the easement, interrupted the claim of right on the part of the plaintiff is manifest, for James Foley must have then been the proprietor of the lot over a part of which the road ran.

It was the duty of the plaintiff beyond all question to make his right clear to the easement he claims under the statute, which I do not conceive him to have done With the exception of the expression in his examination in chief, that, "I lived twenty years or so upon the place,—not far from thirty-eight years," there is nothing to define his occupation, or the period when he first commenced to use the road in question. Again, from whom did he rent "the two lots defendant now has," as he states in his evidence, and how long did he thus occupy them? Surely there was a unity of possession at some time in the plaintiff.

The plans are very insufficient and I am not at all satisfied with the verdict resting upon such imperfect testimony as is presented to us by the Judge's minutes; and I think a new trial should be had in justice to both the contesting parties.

The rule must be made absolute.

McFATRIDGE *v.* HUNTER.

DEFENDANT made a note of hand to S., which was endorsed to plaintiff, who received payments on account of it from time to time from the indorser Defendant made no payments, but, after six years from the date of the note, made a new note to plaintiff for the balance due on the original note, the stamp on which, bearing date identical with the date of the note, was for the single duty, and was affixed by plaintiff on the day subsequent to the delivery of the note to him.

Held, that the stamping was insufficient, and that the note could not be received on the trial as an acknowledgment to take the case out of the statute of limitations, that the payments by the indorser did not enure to prevent the operation of the statute as against the maker, and that the mere striking of a balance as between the parties did not constitute an account stated to take the case out of the statute.

THIS was an appeal from the County Court. The action was brought by indorsee against maker of a promissory note for $220.53, made by the defendant, and dated June 25, 1868. The

writ was issued 24th January, 1877, the last payment of interest on the note having been made, by the payee of the note, 28th January, 1871. A note was tendered in evidence, dated 25th November, 1876, made by the defendant, for $175.61, balance then due on the old note, but it was not properly stamped. Judge JOHNSTONE, before whom the cause was tried, decided that the second note, not being duly stamped, could not be received for any purpose, and nonsuited the plaintiff, on the ground that payments by payee of the note did not operate to take it out of the statute, as regarded the maker. An appeal was granted, and the cause was argued February 11th, 1878, before DESBARRES, McDONALD, SMITH, and JAMES, J J.

Rigby, Q. C., in support of appeal.—The second note ought to have been received as an acknowledgment, though not as a promissory note. The English cases against this proposition do not bind this Court, because they are based on the English statute, 31 Geo. III., which prevents the use of an unstamped note for any purpose. The Canadian statute, Acts of 1879, chap. 13, under which this Court is to decide, says that notes not duly stamped shall be invalid, (meaning as promissory notes, but not as evidence). There was an account stated between the parties here, and that will take the case out of the statute. *11 M. & W.*, 542. Hunter made a note to Sweet, which was endorsed to McFatridge; Sweet made payments on account of it and when it was nearly outlawed, he met Hunter, who adopted the payments made by Sweet, and the balance then due upon the note was stated and agreed upon by the parties.

There is *prima facie* evidence that the payments made by Sweet were made by him as agent of Hunter; therefore we ought not to have been nonsuited. I admit payments made by payee do not enure to take a case out of the statute, if made on his own behalf solely. *1 A. & E.*, 196, is a case strongly in favor of this proposition.

McDONALD, J.—But has not the Judge here in his double capacity of judge and jury, found against you on the evidence?

Rigby, Q. C.—No; he has simply non-suited as judge.

Thompson, contra.—There is no evidence from which to infer agency on the part of Sweet; he was paying his own liability when he paid money on account of the note.

Rigby, Q. C., in reply.—Cites *Darby & Bosanquet.* As to the account stated, we have the fact that an account was stated, and we have the materials from which the account stated was made up.

JAMES, J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This is an appeal from a judgment of non-suit by the County Court Judge of Halifax.

The suit was brought on a promissory note from the defendant to one Sweet, dated 25th June, 1868, and endorsed to the plaintiff, and on an account stated and the usual money counts; pleas of denial, payment, and the statute of limitations, also an added plea that, after the making of the note, defendant gave to plaintiff his own note, instead of the note declared on for $175, which the plaintiff received in payment and satisfaction of the original note, and that the substituted note had not become due at the commencement of the suit.

It appeared by the evidence that after the endorsement of the note to plaintiff, he, (the plaintiff,) applied on several occasions to Hunter for payment, that Hunter always urged him to get as much as possible out of Sweet, (the indorser,) and promised that he would be responsible for the balance and pay all expenses, but that the plaintiff never applied to any one but the defendant.; that Sweet made payments of $51 and $60 respectively, on the note, which were indorsed upon it, but no payments were made by Hunter, nor was any suit brought against Sweet. On 23rd November, 1876, more than eight years from the date of the first note, the plaintiff took from defendant his (the defendant's) promissory note for the balance, viz., $175.61, of the first note in favor of Sweet, deducting the payments. The date written on the stamp on this note was identical with the date of the note. It was for the single duty only, and was affixed by the plaintiff the day subsequent to its delivery to him, as was admitted by him in his evidence. The plaintiff also stated in his evidence that he took this note as a payment. The stamping of this note was held insufficient at the trial, and the plaintiff was refused any benefit from it in the way of taking the first note out of the statute of limitations.

It was contended at the argument, for appellant, that the second note, although invalid as a note, ought to have been received as an acknowledgment of the debt to obviate the effect of the statute of limitations, as the language of our Stamp Act of 31 Vic., chap. 9, sec. 10, is different from and less stringent than the words of the English Act. The latter enacts "that an instrument not duly stamped shall not be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity." Our Act says that such a document "shall be invalid, and of no effect in law or equity."

It has been decided, and I think properly, in *McKay* v. *Grinley*, 30 U. C. Q. B., 54, that a note not duly stamped cannot be used as an acknowledgment to take a case out of the statute of limitations. The English Act and ours are strictly *pari materiâ*, and I think it would be an undue relaxation of the language of our Act to recognize any difference between them, and, therefore, I consider that the second note must be held as of no effect whatever in this case.

It was also contended that, the note being properly rejected, there was an account stated by parol sufficient to take the case out of the statute.

It was held in *Ashby* v. *James*, 11 M. & W., 542, that, in the absence of a written acknowledgment, where A has an account against B, some of the items of which are more than six years old, and B has a cross account against A, and they meet and go through both accounts, and a balance is struck in A's favour, this amounts to an agreement to set off B's claim against the earlier items of A's, out of which arises a new consideration for the payment of the balance, which takes the case out of the operation of the statute.

In *Jones* v. *Ryder*, 4 M. & W., 32, it was held that a mere parol statement of an antecedent debt, without any new consideration, made within six years before action was brought, does not constitute a sufficient cause of action to prevent the operation of the statute. *Per* PARKE, B.; "There must be a *new contract* to support the account stated." And WILSON, J., in *McKay* v. *Grinley*, above cited, says; "I think the mere parol accounting, that is the mere ascertainment of what was due as the balance of a former transaction, does not alter the situation of the parties." Such was the character of the

accounting in this case. It appears to have been a mere computation of the balance of principall and interest due on the former note. Had the amount been reduced by items of set-off received by plantiff within six years, I think the accounting would have been sufficient to protect the plaintiff, but the endorsements were of money payments, which cannot, on familiar principle, be considered as set-off, but as payment, not constituting an independent account which might form the ground of set-off or of an action at the option of the party claiming, but simply as reducing *pro tanto* the original cause of action. Therefore I do not consider the accounting in this case sufficient to protect the plaintiff.

The payments on the note were not made by defendant, but by the endorser, in discharge of his own liability, and cannot enure to prevent the operation of the statute as against the drawer who has never made any payment. It is true the plaintiff proves that he took the second note as payment, but as there is no evidence of any new consideration, and as the note, under the statute, is of "no effect," the payment is only imaginary, and cannot protect the plaintiff. Appeal is dismissed, and judgment below confirmed with costs.

CARTY *v.* BONNETT ET AL.

Sec. 330 of cap. 94, R. S., 4th Series, prevents the replevying of goods seized by and in the custody of the Sheriff, under process, out of the Courts therein referred to, though such goods are those of a third party, a stranger to the cause in which the process issued; and where other defendants, acting in the Sheriff's aid and under his authority, are joined, the writ will be set aside as to all the defendants.

An appearance and plea, under protest, served but not filed, *held* no waiver of the right to move to make absolute a rule *nisi* to set aside the writ obtained before the appearance.

THIS matter came before the full Court on an appeal from the decision of JAMES, J., pronounced at Chambers, in April, 1877. The following is the decision appealed from:

This was a motion by *Mr. Rigby, Q. C.*, for a rule absolute to set aside a writ of replevin against the Sheriff of Annapolis for goods in his possession, under an execution out of the County Court, at the suit of a third party, on the ground of R. S., chap. 94, sec. 330, page 497.

Mr. Thompson contends that the two sections, nos. 329 and 330 are to be read together, and that section 330 only refers to replevin brought by the party against whom the execution has issued, and does not restrain a third person. But it appears to me that the statute was passed to remedy some existing state of the law which was by the Legislature held to be objectionable. If Mr. Thompson is right in his view, the law is now just where it was left by the prior decision in *Ring* v. *Brenan*, James' R., 20. As this was a leading case, and well known to the profession, and tended for the time to settle the law just as Mr. Thompson considers it to be left by this enactment, and quite as effectually as by a legislative enactment, I do not think it was the intention of the Legislature, after the law had been settled on this point for twenty years, to introduce a clause in the Revised Statutes to that effect. I consider it far more probable that the Legislature considered the unfairness to a public officer, who had given bonds for the public security, of making him a party to so sudden and peremptory a proceeding, in which he had no opportunity of protecting himself by procuring an indemnity from the party interested. I am, therefore, of opinion that the statute ought to receive the more general construction contended for by Mr. Rigby for the defendant.

An additional reason for giving an independent construction to section 330, cap. 134, arises from the fact that this section has a different origin from section 329. The first clause of the latter section is taken from our Practice Act, R. S., 3rd Series, and the remainder from the Upper Canada Digest of 1859, ch. 29, sec. 1, founded on 4, Wm. 4, ch. 7, and 14 & 15 Vic., (U. C. Acts); while section 330 is taken from sec. 2 of the same chapter (29) founded on 8 Vic., c. 118.

As for the second objection of Mr. Thompson, that if the defendant's contention is sound, there is no cause in Court, and therefore the affidavits in support of the application, being headed in the cause, cannot be received, I think it is a sufficient answer that if the plaintiff had not issued a writ there would have been no cause in Court, but as he has done so, he is estopped from saying that there is no cause in Court. Besides, I find on file several affidavits made in the cause on behalf of the plaintiff, which are headed in the cause. This objection is entirely untenable.

As to the third objection, that defendant, by appearing and pleading in the cause, had waived objection to the jurisdiction, it was admitted at the argument that the defendant appeared and pleaded after the rule *nisi* issued. As the rule contained a stay of proceedings by the plaintiff, it may have been improper for him to incur further costs by doing so, and, I think that, at least, without establishing to the satisfaction of the Judge who taxes the costs that it was in some way necessary for him to do so, he ought not to be allowed the increased costs; yet I do not consider it a reason for refusing the application.

I must, therefore, make the order for setting aside the writ, absolute, with costs of the action and of this application.

The argument of the appeal from this judgment took place on the 25th February, 1878.

Thompson, for appellant.—The remedy of replevin is not taken away by sec. 330 of the Practice Act, as against a Sheriff wrongfully seizing the property of a stranger to the process, *i. e.*, under which execution is issued. (YOUNG, C. J.—Did you look at *Harrison?* They have the same section there.) The remedy of replevin existed before section 329, and the statute very much extended the remedy as it existed before. Section 330 is simply to prevent the person from taking back his own property, seized by the Sheriff. It is itself declaratory of the common law, that replevin would not lie by the person against whom the process issued, which might in the absence of such a section, have been considered to be abrogated by the 329th section. If this contention is not sound, the Sheriff can seize the goods of any one, and he has no remedy but trover. The words of the statute are, "*the provisions herein contained shall not authorize.*" If the right to replevy by a stranger existed before at common law, there is nothing here to take it away. Section 329 would have allowed a writ of replevin to be sued out, not only by a third party, but by the execution debtor, had its effect not been modified by section 330, which was added for that purpose, and for that alone.

By the appearance and plea, the defendants have lost their right to move to set aside. If it was an irregularity they waived it by appearing and pleading. If it was a nullity, they need not have pleaded at all.

The only cases where a plea can be put in under protest, are, first, where no order *nisi* can be obtained and the time is expiring, and, secondly, when the order *nisi* is taken without a stay of proceedings. The Sheriff is not the only defendant, yet, although the prohibitions of the statute are only in favor of the Sheriff, the whole writ has been set aside. Does the mere insertion of the Sheriff's name invalidate the writ as against the other defendants?

Rigby, Q. C.—The words of the section are a complete answer to the first argument. The words are, "if the goods are wrongfully taken." They cannot be wrongfully taken in any case where they are the goods of the debtor himself taken under execution. *Ring* v. *Brennan* decided that point.

The language of section 330 is plain and distinct; the words are, "*any property*," &c., not the property that could be replevied, but any property at all. The object of the statute was to set at rest questions as to whether, (as was seriously contended in the affimative.) goods could be replevied against a Sheriff by a third person.

Nothing had been waived when the order *nisi* was taken. It was not till afterwards that the party appeared. The objection could not be waived by the appearance afterwards. The fact was that the defendant did not know when he appeared that his rule had been got, and in pleading, he gave notice that it was under protest to save his rights in case the rule was not got. If the writ is a nullity, the appearance could not waive it.

The third ground is that the Sheriff is not the only defendant. See *Fraser* v. *Bruce*, (*ante* p. 6.) The goods were in the custody of the Sheriff. The writ could not be set aside as to one of the defendants. The argument in *Fraser* v. *Bruce*, was that we should have moved to set aside the replevin, as the goods were not in the possession of the Sheriff.

This horse has been wrongfully taken out of the possession of the Sheriff. We have a right to have it returned, even if the other parties are improperly joined; *Ch. Ar.*, 1473.

Thompson, in reply.—In this cases cited in *Ch. Ar.*, there was no order *nisi* got. Cites *Dudley* v. *Jones*, 1 R. & C., 306; *4 Bacon's Ab. Replevin, b.* In England they had a statute,—*the*

Statute of Marlbridge, Hen. 8, yet it was held that the action lay either under the statute or at common law.

If we fail to prove that the other defendants had possession, that is ground for a nonsuit on the trial, but not for setting aside the writ. If we fail to prove it, we must become nonsuit. We intend to prove that the property was taken out of the possession of a party who held it, not for the Sheriff, but as the servant of the plaintiff.

DESBARRES, J., now, (April 1st, 1878,) delivered the judgment of the Court:—

In this case a rule *nisi* was, on the 8th March, 1877, granted by Mr. Justice MCDONALD, to set aside the writ of replevin herein, and all proceedings had under it, and that the horse replevied under that writ be returned to the Sheriff of the County of Annapolis,—on the ground that the horse had been seized by and was in the custody of the said Sheriff, under process issued out of the County Court, and could not be replevied or taken out of his custody, and upon other grounds appearing in the affidavits and exhibits referred to.

On the 9th May, 1877, this order *nisi*, on the argument had before Mr. Justice JAMES, at Chambers, was made absolute. From this order the plaintiff appealed to the full Court on several grounds expressed in the rule;—

First; because the remedy of replevin, as against a Sheriff wrongfully seizing the goods of a stranger to the process in his hands, is not taken away.

Secondly; because by appearing and pleading to the writ of replevin, the defendants lost their right to move to set the same aside.

Thirdly; because the Sheriff was not the sole defendant.

Fourthly; because the remedy of the defendant should have been by plea and defence, instead of by motion to set the writ aside.

Fifthly; because the said order directs that the horse seized under the writ of replevin be returned to the Sheriff of the County of Annapolis.

The case was argued before the full Court, on the 25th February last by *Mr. J. S. D. Thompson*, counsel for plaintiff,

and *Mr. Rigby, Q. C.*, for defendant. The grounds then insisted upon by *Mr. Thompson*, in support of the appeal, were;—

First; that the remedy by replevin, as against a Sheriff wrongfully seizing the goods of a stranger to the process in his hands, was not taken away by chap. 94 R. S., 4th Series.

Secondly; that by appearing and pleading to the writ of replevin, the defendants had waived and lost their right of moving to set the same aside.

Thirdly; that the Sheriff not being the only defendant, the writ as to the other defendants could not be set aside.

The case, I think, rests altogether on the first ground, and the sole question is whether replevin will lie against a Sheriff for property seized by him, and in his custody under process of law. This was a question which was fully and ably discussed and considered by this Court, shortly after my appointment to the Bench, in the case of *Ring* v. *Brenan*, James' R., 20, in which it was held that replevin *could* be maintained against a constable for seizing the goods of a stranger, under an execution or warrant issued against another person, but the Legislature has since then passed an act which, as regards Sheriffs, at all events, controls that decision, extending the remedy by replevin, and giving greater protection to Sheriffs than they formerly possessed. Under section 329, chapter 94, *R. S.*, "the owner or other person or corporation capable of maintaining an action of trespass or trover for personal property, may bring an action of replevin for the recovery thereof, and for the recovery of damages sustained." Section 330 of the same chapter declares that, "the provisions therein contained shall not authorize the replevying of or taking out of the custody of any Sheriff or other officer, any personal property seized by him under any process issued out of the Supreme Court, or any District or County Court of the Province." This last section is taken from sec. 2, chap. 118, *Upper Canada Act of 1845*, and sec. 3, chap. 53, *Revised Statutes of Ontario*. It applies to strangers to the process, as well as to the parties, and was intended to give a necessary protection to Sheriffs in discharging the duties of their office, leaving those whose property is wrongfully taken by a Sheriff

to the remedy by trespass or trover for any damages sustained. Sheriffs, as is well known, are obliged to give security for the the due performance of their duties, and can at all times be held responsible for any wrongful seizures they may make, and there is, therefore, no necessity to have recourse to replevin for taking such property out of their hands.

In reference to the second point, but little need be said, further than that it appears to me no act was done on the part of the defendants amounting to a waiver of their right to set aside the writ of replevin. An appearance and plea it is true was served upon the plaintiff's attorney, but not filed, which, being a nullity, he was in no wise bound to respect. I am of opinion that sec. 330 of chap. 94, *R. S.*, is a full answer to, and conclusive upon, all the grounds urged for setting aside the order appealed from, and that replevin will not lie against the Sheriff under the circumstances of this case, or against the other defendants acting in his aid and under his authority, who are entitled to the same protection as himself.

In my view of this case, the appeal from the order absolute ought to be dismissed, and, as I think, with costs.

WIER *v.* LETSON.

DEFENDANT, previous to the 1st April, 1876, engaged with plaintiff by parol, as clerk, at a fixed rate *per annum*, with a share of profits on a separate branch of the business. On February 14th, 1877, defendant asked for and obtained a fortnight's leave of absence, when an accounting was gone into, and plaintiff gave defendant his promissory note, (which he afterwards paid,) for the balance of his salary up to the end of the year, April 1st, 1877. Defendant did not return, and plaintiff brought action for non-fulfilment of his contract of service and for money had and received.

Held, that, although the Plaintiff could not recover on the count for non-fulfilment of defendant's contract, as that was not to be performed within a year, he could recover on the money count, as the defendant had received payment for services to be performed within a few weeks, (from the time of giving the note,) and which services defendant did not render.

Under sec. 25 of the Amending County Courts Act of 1877, cap. 6, the Court has no jurisdiction to reverse the decision of the County Court Judge on disputed questions of fact.

THIS was an appeal from the decision of JOHNSTONE, J., of of the County Court, and was argued during the present term by *Thompson* for defendant appellant, and *McCoy, Q. C.*, and *Longley*, contra.

JAMES, J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This is an appeal by defendant from the judgment of the County Court Judge for Halifax in favour of plaintiff, in an action for not fulfilling a contract for a year's hiring, and for money had and received.

The plaintiff deposed that the defendant engaged with him by parol contract as a clerk, at a salary of $900 per annum from 1st April, 1876, with the addition of half profits on a separate branch of the business; that on the 14th February, 1877, the defendant asked for leave of absence to visit his friends in New Brunswick; that an accounting was then had, and a promissory note given by plaintiff to defendant for $214.66, which was paid when due by the plaintiff; that this sum was made up of the balance of defendant's salary to 1st April and the settled balance of profits in the branch of business conducted by him up to 1st April,—the end of the year—and that plaintiff expected defendant back in a fortnight. On the 24th February, 1877, the defendant wrote from Chatham, N. B., to plaintiff a very friendly letter, stating that he had an offer of better employment which he had decided to accept, evidently expecting to receive the plaintiff's friendly congratulations on his good fortune; which was met by the plaintiff in an unfriendly spirit, and immediately followed by a public advertisement by the plaintiff, dated 3rd March, that the defendant was no longer in his employ. This terminated the transactions between them.

The defendant's statement in evidence was contradictory to that of the plaintiff in relation to the terms of the contract, the settlement and other material facts.

We have no jurisdiction under section 25 of the amending County Courts Act of 1877 to reverse the decision of the County Court Judge on disputed questions of fact. This has already been decided in two cases during the present term, and therefore we are bound to confirm the judgment below, except where it is affected by matters of fact not in dispute, or by matters of law.

At the argument several matters of law were urged by the defendant's counsel against the judgment below; among

others, that the contract was void under the statute of frauds, sec. 3, as not to be performed within a year.

The fact is clear that it was entered into some time before the commencement of the defendant's service on 1st April, 1876. The defendant says it was made about the middle of March. and this is not denied by plaintiff. In so far as the action is founded solely on the contract of hire, the law as laid down in the cases cited *(1 B. & Ald.*, 722; *1 C. M. & R.*, 20, *1 H. & N.*, 81, and 31 *U. C., Q. B.*, 141,) would apply. In the case of *Bracegirdle* v. *Heald*, 1 B. & Ald., 722, it was held that a contract for a year's service, to commence on a day subsequent to the making of the contract is within the statute; "for a contract which extends *one minute* beyond the time pointed out by the statute falls within its operation." The other cases cited fully confirm the doctrine. See *Addison on Contracts*, sec. 212. These cases sufficiently meet the first two counts of the declaration which seek to recover against the defendant for not fulfilling his contract to serve the plaintiff for a year.

But they do not meet the count for money had and received, which is not founded on the contract, but is rather in disaffirmance of it. It has been found by the learned Judge, and we are bound by his decision, that the defendant received payment from the plaintiff for services to be performed within a few weeks, which services he did not render. It is a new contract not at all affected by the statute. We must hold this in accordance with the argument of defendant's counsel, whose contention is that in law there was no previous hiring. If not, this was a new hiring from 14th February to 1st April, in consideration of a specific sum of money paid in advance.

The same answer applies to the second legal ground taken by the defendant's counsel at the argument, and supported by reference to *7 T. R.*, 181; *3 M. & G.*, 467, and other cases, viz., that the contract was not divisible,—that the services of the plaintiff at that season of the year when there was but little business, were of less value than in the summer months, and that the plaintiff must rely on the two counts for damages for non-fulfillment of his contract, in order to get at the true measure of the loss sustained. The answer to this contention, I have given above, in my conclusion that this action was not founded on a contract for a year's hiring, but on the considera-

tion of a specific sum of money agreed between the parties, and paid in advance for a few weeks' services which were never rendered.

The judgment below must, therefore, be affirmed, with costs, subject to a deduction, (which on the whole case I am not reluctant to grant,) of the sum of $37.20, for the first fourteen days' service under the contract. The plaintiff proves that he gave the defendant leave of absence and did not expect him to return within fourteen days; and it further appears by the defendant's uncontradicted statement, that he was employed by the plaintiff to sell goods for him during his absence. For this period, therefore, the plaintiff has clearly no right to recover. It is simply an error arising from oversight of the cou nsel, and common justice requires that the judgment be modified accord ingly. As this was not a matter of contention, until suggested by the Court on the argument, it cannot affect the costs. The plaintiff will not be allowed costs for the first and second counts of his declaration, which he has failed to sustain, and a corresponding reduction must be made in the issue and record rolls and copies of papers furnished to the Court.

BARTON ET AL. v. BALDWIN.

WHERE the defendant pleads a plea on equitable grounds, the replication thereto need not allege that it is on equitable grounds, as no replication on any other grounds can be pleaded.

DESBARRES, J., now, (April 23rd, 1878), delivered the judgment of the Court:—

On an application to this Court, on the part of the defendant, a rule *nisi* was granted to strike out of the record the replication of the plaintiff to his 5th and 6th pleas in this cause, pleaded on equitable grounds;

1. Because the replication is pleaded without the leave of the Court or a Judge

2. Because the replication does not allege it to be pleaded on equitable grounds, and does not contain the words, "For a replication on equitable grounds."

It is said in *Day's C. L. P. A.*, 334, that an equitable plea makes the subsequent pleadings equitable, although they are not so pleaded, and the replication may be supported on any ground that shews an answer to the plea. For this, the case of *Salvin v. Holylake Ry. Company*, L. R., 1 Exch., 9, is cited as an authority. The defendant, having by his 5th and 6th pleas, set up a defence on equitable grounds, the subject matter pleaded became a matter of inquiry on equitable principles, and could be dealt with in no other way. Being, then, a proceeding in Equity, so far as the pleas had made it, it was not necessary for the plaintiff, in replying thereto, to state in express words that it was a replication on equitable grounds, as no replication on any other could be pleaded. If the defendant had not pleaded on equitable grounds, the objection taken to the replication would have been good, for, in that case, the plaintiff would have been compelled, under section 163 of chap. 94, to state the replication to be on equitable grounds, but he had a right, in this case, to reply as he did, without stating that fact, and therefore the rule for striking the replication out of the record must be discharged, with costs.

BATH, EXECUTOR, *v.* DENNISON ET AL.

DEFENDANTS entered into a bond to the plaintiff and his co-executor, to secure a debt of $610, payable by instalments, the first of which, amounting to $161.40, was over due; but the condition of the bond referred to a mortgage given contemporaneously with it, which contained a covenant that on default made in the payment of any instalment, the whole sum unpaid should immediately become due and payable. Action was brought in the County Court for the amount of the instalment.

Held, that the judgment of that Court, which was for plaintiff, could not be sustained for want of jurisdiction, the debt being indivisable for $610, and recoverable only in the Supreme Court*

THIS was an appeal from the County Court. The cause was tried at Annapolis, before Judge SAVARY, and judgment given for plaintiff. An order for appeal having been refused by the Judge, a rule was taken out for the appeal under the provisions of the County Court Amendment Act of 1877.

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*The Court threw out a strong opinion that defendants could not set up as a defence that they had agreed to advance certain goods to the deceased executor in his lifetime, which were to be credited and received by him as such executor in payment of the moneys to become due on the bond; but that point was not formally decided.

Graham objects that the rule is informal, not purporting to be by the Court, and not being signed by the Clerk of the Court, but by "A. W. Savary."

The COURT.—We will make a note of the objection.

The action was brought to recover a balance due on a bond made by defendants to plaintiff, and his co-executor, since deceased. Defence, that defendants had paid the balance to deceased executor in his life-time, to which it was replied that the payments were not made to him as executor. The appeal from the judgment in favor of plaintiff was argued February 21st, 1878, before YOUNG, C. J., and MCDONALD, SMITH and JAMES, J J.

McDonald, Q. C., in support of rule.—The only issue raised by the pleadings, is, were there payments to the plaintiff or his deceased co-executor. The evidence shews that the payments made to Troop, the deceased executor, were made to him as executor.

Evidence was improperly admitted to prove that the plaintiff and Troop were trustees, though the action was brought by plaintiff as surviving executor.

The debt sued for here was one really due the two executors as individuals, for money for which they were liable to the estate.

A payment to one of two joint creditors is a payment to both; *3 B. & C.*, 421; *10 C. B.*, 645, where it is laid down that payment to one of two trustees of a bond debt is good.

YOUNG, C. J.—A release by one executor is good. There are thousands of dollars invested by two and three trustees where one does all the business.

McDonald, Q. C.—*7 M. & W.*, 264, and *4 Ch. Ap.*, 433, are strong cases in our favor. *L. R., 15 Eq.*, 204, is the only case on the other side, but there the trustees were not executors, but trustees only, and the parties paying the money were aware that the money was to be paid to them jointly. *Perry on Trusts*, 806, 412.

Graham, contra.—The set-off pleaded here consists of a grocer's account against the deceased executor. Could the defendants have sued the deceased executor, Troop, *as executor*, for the amount of this account? *2 B. & C.*, 444; *Bullen & Leake*, 154; *3 M. & W.*, 357.

It is contrary to the policy of the law that an executor, holding trust funds, can make an agreement of this kind to have a debt to the estate paid in goods to him.

The defendants here swear they would not have trusted Troop, nor given him goods at all, except on the agreement that they were to be credited against the defendants' debt to the estate. The defendants therefore must be held to have known that Troop was not likely to be able to refund the money to the estate. *Perry on Trusts*, 433.

Rigby, Q. C., in reply.—As to the instalment sued for, cites *Ch. Arch. Pr.*, 1056. Suppose *Troop* had been the surviving executor, and made the same arrangement with the defendants, could he afterwards sue them as executor? Troop was the acting executor while living. The defendants here do not plead a set-off, for which they would have a right of action; they plead accord and satisfaction.

SMITH, J., now, (April 23rd, 1878,) delivered the judgment of the Court:—

This is an appeal from the judgment of the County Court Judge for District Number Three. It is an action brought by J. Fletcher Bath, the surviving executor of Eliza Ann Bath, deceased, to recover from the defendants the sum of one hundred and sixty-one dollars and forty cents, ($161.40) alleged to be due as the first instalment, payable under a bond given by defendants to the said plaintiff, and Jared C. Troop, deceased, in their capacity as executors and trustees of said Eliza Ann Bath. The amount for which the bond was given was $810. The defendants pleaded several pleas, but the attention of the learned Judge was evidently directed, principally, to the defence set up in reference to the agreement asserted to have been made between defendants and the plaintiff's co-executor, Troop, in his life-time, by which defendants agreed to advance to the said Troop certain goods and merchandize which were to be credited and received by him as such executor, in payment and satisfaction of the moneys growing due on said bond. That such an agreement was entered into, and that advances were made in compliance therewith, and in excess of the sum sought to be recovered, the learned Judge seems to have considered as established, as I think the evidence justified

him in doing, and if such a contract would furnish either a legal or an equitable defence, of course the judgment could not be upheld. While entertaining, however, upon perusal of the authorities, a very strong opinion, in the light of defendants' own testimony, particularly in reference to his knowledge of the insolvency of Troop at the time when the agreement and advances were made, that *such* a defence would not for a moment be sanctioned by the Court, it is unnecessary for me to go further than to express my conviction on this point, in order that it may receive some prudential consideration at the hands of the parties in any further proceedings they may think expedient to adopt.

The judgment cannot, in my opinion, be sustained, for want of jurisdiction of the Court below. I am not at all prepared to say that there is not some force in the objection taken at the argument, that, the penalty being, in law, the debt, the moment a forfeiture of the bond occurred, judgment should have been for the penalty, but without deciding what, perhaps, under our systems of pleading and practice, may be regarded as a technical difficulty merely, there can be no doubt, but that at the time the action was brought, the debt due and recoverable under the bond was $810, being the full amount for which it was given. The condition of the bond refers to the proviso of the mortgage, given contemporaneously with the bond, by the defendants to the plaintiff and Troop in his life-time, and which becomes the paramount and controlling instrument. This document, after specifying the different dates at which the instalments were to be paid, says; "Also, provided that on default being made in the payment of any instalment, or part thereof, or interest, the whole sum unpaid *shall* immediately become due and payable."

I regret that I cannot concur with the learned Judge below, and regard the action as brought only for the first instalment, when the whole debt then recoverable was in excess of his jurisdiction, as properly constituted.

To uphold such a position would, I apprehend, open the door to infinite and vexatious litigation, and the processes of Courts of Justice might be made thereby the instruments of perplexity and oppression. If this was permitted, a party who had a debt due him of $2,000 could bring as many suits as he

might deem pleasant or convenient, in order to recover the amount by piece-meal, and in sums sufficiently small to bring them within the jurisdiction of the inferior Courts. When the forfeiture of the bond took place, the money was no longer payable by instalments. It became a debt indivisible for $810, payable at once and in full by the terms of the mortgage, and recoverable only in the Supreme Court. I think, therefore, that the judgment below must be reversed.

IN RE ESTATE OF PINE.

TESTATOR was a man of religious habits and a member of the Methodist Church. A fortnight before his death he had matured the sketch of a will, substantially similar to the one executed, which left considerable property to the Church. On the afternoon of the Monday before his death he sent for Henshaw, one of the executors, who came in the evening and took instructions from testator for drawing the will which was prepared next morning. When these instructions were taken there were four persons present besides the testator and Henshaw, three of whom were interested in sustaining the will, but neither of these was produced as a witness, nor were the instructions produced, although the Court had adjourned for the purpose of enabling them to be obtained; and Troop, who was present and adversely interested, had been sent out of the room, without it being shown that it was by testator's request. The witnesses present at the execution, which took place on the Wednesday before testator's death, differed greatly in their statements as to what then took place, but it was admitted that one clause of the will had been intentionally read to testator differently from the way in which it appeared in the will, and that testator made no remark. His name was added to the will by one of the executors without his consent having been asked for or his authority given, and he died the next day.

Held, that the decision of the Judge of Probate setting aside the will must be sustained; costs to be paid out of the estate.

THIS was an appeal from a decision of the Judge of Probate for the County of Annapolis setting aside a will. The evidence was very voluminous, and the argument, which was directed mainly to the question whether the testator was of sound and disposing mind, consisted on both sides almost wholly of an analysis of the evidence, and is for that reason omitted.

Rigby, Q.C., for appellants, cited *12 Moore, P. C.*, 278; *L. R., 5 Q. B.*, 549; *1 Williams on Executors*, 36; *1 Ch. R.*, 24; *1 Dowl.*, 241; *3 Bligh, N. S.*, 374; *2 Hagg.*, 122; *3 Moore, P. C.*, 282; *1 F. & F.*, 578, 584; *2 White & Tudor's L. C.*, 1286; *3 C. B., N. S.*, 8; *L. R., 1 P. & D.*, 64, 70, 655; *1 Taylor on Ev.*, 150.

Shannon, Q. C., contra, cited *1 Phil.*, 60; *2 Phil.*, 173; *12 Grant's Ch. R.*, 500; *15 Grant's Ch. R.*, 586; *1 Hagg.*, 233; *1 H. of L. Ca.*, 191.

JAMES, J., now, (April 23rd, 1878,) delivered the judgment of the Court:—

This matter comes before us on the appeal of James Henshaw, from the decree of the worshipful Judge of Probate for the County of Annapolis, that Stephen Pine, at the time of his alleged execution of his last will and testament was not of sound and disposing mind and memory. The will was first proved in common form, and, on petition of parties interested as heirs of the deceased for probate, in solemn form. Evidence was heard by the Judge, and the execution of the will decreed to be invalid. The principal question we have to consider is as to the condition of the mind of the deceased at the time of the execution of the will.

Mr. Pine was a farmer, residing a few miles from Clementsport in Annapolis County. He was in somewhat prosperous circumstances, having property, as it appears, to the value of about five thousand dollars. He was never married, but kept house, with one of his nieces as housekeeper, and had several brothers and sisters, and their children and connexions, some of them very poor, residing in his neighborhood. He was a man of religious habits and warmly interested in the Methodist Church, of which he was an attached member. His age at the time of his decease was seventy-two years. The will is not contested on the ground of insanity, but on the ground of the imbecility of the testator's mind, arising from illness. His will makes definite provision in lands and money for his housekeeper and three others of his relatives, bequeaths ten dollars to each of his two executors, one hundred dollars for repairing the Methodist Church in his neighborhood, and leaves a farm and the residue of his estate to the Methodist circuit in which he resided. There is nothing on the face of the will, nor in the circumstances given in evidence, to shew that the will was unjust or extravagant, or in any way different from what might not unreasonably have been expected from a just and prudent man of his admitted character and proclivities in full possession of his faculties; and it appears by A. Purdy's

evidence that a fortnight before his death he had matured in his mind the sketch of a will substantially similar to that under dispute. The alleged execution of the will took place on Wednesday, the 21st day of March, 1877. The testator died the next morning. It appears by the evidence that the deceased began to fail about a fortnight previously; his illness began to assume a serious aspect on the Sunday before his decease, and it appears that it was then considered to be fatal, as on the following day, John Troop, the husband of a niece of the deceased, who had visited him on Sunday, made an arrangement with Wallace Harris, a nephew of the deceased, and one of the executors named in the will, that one or the other of them would remain with him until his death, "in order to induce him to make a will if we found a time at which he would be competent." Harris stayed with him that afternoon and during the night. The next morning, between nine and ten o'clock, Troop introduced to deceased the subject of the will. He says; "I attempted to get information from him to prepare a will; he gave me no satisfaction;" and he details a long conversation with the deceased, throughout which he (Troop) strongly urged on him the propriety of his making his will, ending with Mr. Pine's impatient exclamation, "I have thrown it away, and I won't be bothered with it any more." This evidence is introduced to shew the testator's incapacity. To my mind it conveys very clearly the contrary impression; but I refer to it because, taken in connection with subsequent declarations of the deceased and other circumstances, it tends to throw light upon his mental condition. Whether he had at the time abandoned all idea of making a will, or was only unwilling that Troop should take part in the operation, is doubtful; but it is certain that in the afternoon he sent for Henshaw, the executor, who appeals from the decision of the Judge of Probate. Henshaw came in the evening and took instructions from Mr. Pine for drawing the will. During the day he had several conversations with other parties besides Troop, including a conversation and devotional exercise with Rev. Mr. Sponagle, Wesleyan minister, who administered the Lord's Supper to him together with his relatives present; also a conversation and devotional exercises with Mr. Johnston, a Wesleyan theological student then sup-

plying the district in the absence of an ordained minister. There can be no doubt, from their evidence, that up to the time of Henshaw commencing to take the instructions, his intellect in reference to religious subjects was clear and strong. His mind seems to have been set on his near approach to another world, to which he was looking forward with a clear and confident hope; but it is worthy of observation that neither he nor the reverend gentleman who ministered to him ever alluded in these interviews to his worldly affairs. It was known or believed that he intended to leave a considerable portion of his property to Wesleyan purposes, and it would not only have been natural, but quite proper, that, with this knowledge which they undoubtedly possessed, they should have called his attention to the propriety of giving effect to his intentions by a testamentary disposition of his property; but, with a delicacy of feeling worthy of admiration, they refrained from the slightest allusion to the topic, and had no connection whatever with the proceedings which afterwards took place in connection with the will. It is but justice that this observation should be made, in view of the cross-examination of the witnesses in support of the will. If religious zeal had any part in the preparation of the will, or unduly influenced some of the witnesses called to support it, these gentlemen, at least, are free from any such imputation. And yet I cannot help thinking that these reverend gentlemen would have better performed their duty had they gone on to enquire of the sick man whether he had settled his worldly affairs, admonished him that the best way for a man to die was in the performance of duty, and advised him to send at once for a solicitor to draw his will. We would not, probably, have been edified by so striking evidences of great religious fervor, but this litigation would have been avoided, and the real intentions of the dying man for the disposition of the fruits of his industry and economy during a long life would not have been disappointed.

Henshaw, who was a zealous Methodist, states that, in taking the instructions, the substance of the will as now presented to him was dictated to him by Pine without suggestion, except as to the remuneration of the executors, the amount of which, at Henshaw's instance, was named by Pine and assented to by Henshaw, who noted it down with the other instructions, which

he took down in writing, and carried to Mr. Roop at Clementsport, who from them, with Henshaw's assistance, prepared the will the next morning.

If there is any confidence whatever to be placed in Henshaw's evidence, the testator was during this interview in a fit state of mind to give instructions for drawing the will; but Mr. Pine was unquestionably in a very low and weak condition, and must have been greatly excited and fatigued by previous conversations throughout the day. Indeed we have positive evidence to that effect. It is worthy of very pointed remark that there were, by Henshaw's admission, four persons in the room besides the testator and himself when these instructions were taken—three of whom were provided for in the will and interested in sustaining it—none of whom were called to sustain his evidence as to what took place on the occasion, while Troop, who was present and interested in an opposite way, was sent out of the room, without any evidence that it was done at the testator's request. In addition to this very material omision in the appellant's evidence, the written instructions themselves, which Henshaw swears he never destroyed, were not produced in evidence, Henshaw stating that he could not find them. The Court was adjourned to enable him to obtain this important testimony, and when he came back next day, alleging that he still could not find them, he admitted that he had failed to apply for them to Mr. Roop, the person who had last used them in preparing the will. He omitted to search in the very quarter where they were most likely to be found, and suffered the case to be closed without their production. Nor is Mr. Roop called to prove that there were such instructions in his possession, or account for their absence. Almost everything that took place the next day, both at the reading and execution of the will, is not only the subject of contradictory testimony, but on Mr. Henshaw's own evidence of what took place, is enveloped in doubt and difficulty; and the omission of the important evidence, both of the four persons present and of the written instructions, throws suspicion on Henshaw's evidence, and over the whole of the appellant's case, which must have a material effect in the consideration of what took place afterwards at a time when the physical strength of Mr. Pine was much diminished, and his mental powers at least

greatly impaired. The next morning, Wednesday, the will was read and attempted to be executed. It appears by the evidence of Samuel P. Milner, a son of Mr. Milner, whose family was provided for in the will, and who with his mother had been sitting up in the house during the previous night, that at about seven or eight o'clock, A. M., when Pine was in a very weak and miserable condition, he commenced talking to the witness. "He said; they had been bothering him about his property and about a will. I could not understand him clearly. He would have to raise his voice so that I could understand him. He said; 'I will have nothing to do with it. It is nothing but dung and dross. I am going home. It may go from whence it came.'" At seven o'clock he had another conversation with a religious friend and neighbour, David Berry, in which he stated "the strong evidence he felt for a better inheritance beyond the grave." His conversation was almost wholly on religious matters, and no allusion was made by him to his making a will or disposing of his property. Berry's evidence is very strong as to his total abstraction from worldly matters, and similar statements were made by Pine to Mrs. Ham and others. I attach much significance to the emphatic declarations of the deceased to Troop, Milner, Berry and others, that he had totally abandoned all interest in worldly matters, and to his utterly refraining from referring to them or to his will in all his late conversations. These matters help to explain what took place afterwards. He appears in relation to all such matters to have been perfectly passive, except in the matter of sending for Henshaw. I can hardly except the giving of the instructions to Henshaw, unsupported as it is by material evidence which appears to have been deliberately withheld. At about noon on Wednesday the two executors, Henshaw and Wallace Harris, met at Pine's house to read the will. No other persons were present during the time it was read. I think the evidence as to what took place, although somewhat contradictory, is sufficient to shew his assent to the will as it was read to him, clause by clause, and I would have no difficulty in sustaining the presumption of his understanding that to which he gave a formal assent, were it not for a very curious and significant piece of testimony which is entirely uncontradicted, and which materially affects my judgment on this part of the case.

Wallace Harris states on his re-examination, and it is expressly admitted by Henshaw, that he and Henshaw had previously agreed between themselves that the sixth clause of the will, which bequeaths one hundred dollars to repair the Methodist Church, should be read, not as stated in the will, and as it now stands there, but as if it were three hundred dollars, and the clause was read in that way and assented to by Pine without remark. We have no evidence to explain, nor can I conjecture, what object the parties had in view in this singular proceeding. It is to be presumed that there was no fraudulent intention, as none is alleged; but this undisputed fact goes a long way to confirm Harris's statement that he was "uninterested, sleepy and drowsy." Harris's obvious impression was that Pine's mind was not then sufficiently vigorous and active to enable him to understand what was going on. It was contended that we might strike out the clause affected by this gross irregularity, (to apply the mildest expression,) but we cannot shut out its effect in determining the already doubtful question as to the mental condition of Mr. Pine, and its tendency to confirm his very emphatic and repeated declarations in the morning in reference to his making his will, that he had ceased to have any interest whatever in relation to his worldly affairs. If one clause was read to him without attracting his attention, how can we conclude that he understood a word of the remainder, to which, as well as to this clause, he thus formally assented?

The case is in this respect somewhat similar to that cited by Swinburne, (*Walkem*, 130; *1 Redfield*, 131–2,) of a monk who came to a gentleman then *in extremis* to make his will. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered "yea;" then, if he would give such and such estates to such and such pious uses. The gentleman answered "yea" to them all. The heir at law observing the covetousness of the monk, asked the testator if the monk was not a very knave, and he answered "yea." The will, which was set aside, might perhaps have stood had it not appeared by the last question and answer that the sick man would answer yea to every question that was put to him. So it seems to me that the omission by Pine to notice the intentional error in reading the sixth clause, shews that

the testator, when he assented to each clause, had lost the power of attending to the subject-matter before him, so as to comprehend its purport and meaning.

The instructions given by the testator are next to valueless, for want of necessary evidence to support Henshaw's statements. The reading of the will by Harris and Henshaw is at least equally useless, from the fact that Mr. Pine, whether competent or not, did not in fact understand it. Was there any subsequent intelligent assent by him to its contents?

After the reading of the will, Henshaw and Harris adjourned to dinner and met again in Pine's room at between two and three o'clock, p. m. There were present at this time the two witnesses, Peck and Pickering, the two executors, Harris and Henshaw, and Charles D. Pine, besides Mary Anne Pine, the housekeeper, who was in and out of the room. Of these, the two signatory witnesses and the two executors were examined, and they differ very much in their statements of what occurred, which are taken down with great particularity. Peck, Pickering and Harris assert the almost total want of volition on the part of Pine. He could not see even with glasses. He could not speak. He had to be held up in the bed. He was unable to hold the pen in his hand or to write his name, which was written by Harris at Peck's request, with Pine's hand resting on Harris's arm, but not touching the pen, &c. And these witnesses state, after minutely detailing the circumstances, their belief that he was not only wholly indifferent, but wholly unconscious of what he was doing. I think we can make out from the witnesses of the appellees that Pine was asked by Henshaw when the latter came into the room, if he would get up and sign his will, but they did not hear him reply. They all agree that he helped to adjust the spectacles that were procured when it was found that he could not see, and there are one or two other minute circumstances proved indicating volition; but they all very emphatically state their disbelief in his capacity to understand what he was doing, and their confidence that he did not know it was a will or who were the witnesses. Henshaw, on the contrary, says that Pine bowed his head when asked if he wished to get up and sign his will; that he said; "I can't see; I want my glasses;" that after the glasses were adjusted, partly by Pine himself, the pen was put in his hand and he made an attempt to use it.

There was a serious objection made at the argument to the evidence of Peck and Pickering that they, having witnessed the will, should not be believed when called to impugn the capacity of the testator; and reference was made to the case of *Wilson* v. *Beddard*, 12 Sim., 14, in which it was said by a Vice-Chancellor; "I have always thought that, if any attention at all ought to be paid to testimony of witnesses who deny such a solemn act to which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether, and I confess my mind is very little affected by their evidence."

In that case the decision was wise and good, but I consider the *dictum* of the learned Vice-Chancellor, as given to us by the reporter, unguarded and indiscreet in its terms. I am in hopes he has been misreported. In that case there were three witnesses to the will, one of whom was the solicitor who drew it, and his evidence was very properly taken in preference to that of the two others who denied the sanity of the testator. There was not only a competent party present with whom the witnesses could consult, but ample time and opportunity for them to do so. Here the deceased was *in extremis*, evidently a dying man, and rapidly sinking, and the witnesses were unskilled and without time or opportunity for consideration or consultation. My opinion is that witnesses, in many cases of emergency where there is room for doubt, are quite excusable in signing as witnesses, though they may have serious doubts of the testator's competency, which doubts on subsequent reflection and consultation may ripen into certainty one way or the other.

I think the testimony of Peck of but little consequence, because, in spite of his doubts, he proved the will in common form, and the testimony of Harris is also weakened by the fact that he took part in the original probate. But Pickering was a reliable and disinterested witness, and, in my opinion, his testimony is of at least equal value with that of Henshaw, especially when the latter, if correct, could have been so easily strengthened by that of Charles Pine who was present and interested in sustaining the will.

But I do not rely so much on what was said and done as upon what was, by common consent, not said or done. The

burthen of proof was undoubtedly upon the appellant as soon as the two witnesses to the will had given strong *prima facie* evidence against it. All the circumstances attending the instructions and the reading of the will, and especially the obviously weak if not imbecile condition of the testator, called for the utmost solicitude on the part of those in charge of the will, to see that he then understood its contents. What are the admitted facts? It is doubtful if the sick man ever knew that the paper presented to him was a will. He was not plainly informed that it was a will, or that it was the paper read to him in the morning, and if he had been so informed it would have been false, for one important clause had been intentionally misread to him. He was not asked if it was his will, nor did he make any declaration or sign to that effect. His consent was not asked, nor his authority given to Harris to write his name. It is quite immaterial whether his fingers touched the pen or not. The act was Harris's, and not his, by the testimony of all the witnesses. Whatever may have been the fact as to his capacity, he seems to have been treated by common consent as if he were an insensate physical object, out of which a signature was to be extracted in order to make the document valid. I am quite sensible of the suspicion attaching to much of the evidence against the validity of the will; but the facts I have just mentioned, and upon which I mainly form my opinion, are undisputed and are worth volumes of contradictory statements.

In my opinion, very reluctantly adopted, (because I consider that Henshaw acted in good faith, and because I believe the will to be substantially what the testator had intended before he was seriously unwell,) the appeal should be dismissed on two grounds:—

1st. Because the will was not signed by the testator, or at his request, and was not subsequently acknowledged by him.

2nd. Because he was mentally incompetent for its due execution and did not know that the paper before him was his will, or sufficiently understand its contents.

I think the costs should be paid out of the estate.

THE TRUSTEES OF PUBLIC PROPERTY FOR THE COUNTY OF CUMBERLAND *v.* JAMES J. KERR.

In August, 1788, W. Freeman, in consideration of a building to be erected for a court house and jail, at Amherst, conveyed certain land to a number of Justices of the Peace for the county, named in the deed, and their associates; *habendum* to them and their successors in trust for the County of Cumberland forever. The Act of 1848, c. 28, after reciting the execution of this deed, the erection of the court house and goal, and the death of all the trustees named in the deed, enacted that the Grand Jury and Sessions should appoint trustees, to be a body corporate by the name of "the Trustees of the Amherst Court House Grounds," in whom was to vest the legal estate in the land in question, provided, among other things, that the act should not interfere with the management and control thereof being vested in the Sheriff for the time being. This act continued for six years, but before its expiration, the first edition of the Revised Statutes was published, which, by cap. 97, provided for the appointment of "Trustees of Public Property" in each county, and vested in such trustees "all lands granted, reserved or dedicated, or which had for twenty years before the passing of said chapter been used for public purposes in the county." The statute contained a clause declaring that the provisions of that chapter "should not affect any lands or buildings then vested in trustees, or the necessary control of the Sheriff over the court house and jail." This statute was re-enacted in each successive edition of the Revised Statutes. Sheriff Chandler had held possession of the property as Sheriff, and his son had paid rent for it up to 1851, and on the appointment of the defendant as Sheriff, late in 1858 or early in 1859, he had taken possession from the son of the former Sheriff. Defendant also claimed under a deed from Chandler, the former Sheriff, but it appeared that in 1862 he had voluntarily accepted office as one of the trustees of public property, and acted as such until 1875.

Held, that the moment the Act of 1848 ceased to have effect the land vested in the trustees appointed under Revised Statutes, 1st Series, (1851,) and that, apart from the effect of the Revised Statutes of 1858, vesting the property in the trustees subsequently appointed within twenty years of the commencement of the action, the plaintiffs had not been twenty years out of possession at the commencement of the action, as the possession of the defendant and his associate trustees from 1862 to 1875 was the possession of the plaintiffs.

Joinder of the Trustees of Amherst Court House Grounds, added under an amendment obtained at the trial, held mere surplusage.

THIS cause was tried before DESBARRES, J., at Amherst when a verdict was found for plaintiff. A rule *nisi* was taken to set the verdict aside, and argued before DESBARRES, McDONALD and SMITH, J J.

McDONALD, J., now, (April 23rd, 1878), delivered the judgment of the Court:—

The deed under which the plaintiffs' claim was executed by one William Freeman, on the 12th day of August, 1788, and commences thus;—"Know all men by these presents, that I. W. Freeman, of Amherst, County of Cumberland, N. S., for and in consideration of a building to be erected for a court house and gaol, on the lot No. 60, aforesaid, have given, granted, bargained, sold, aliened, conveyed and confirmed, and, by these presents, do give, grant, bargain, sell, alien, convey and confirm unto E. Barron, W. Black, and C. Baker, Esquires, Jus-

tices of the Peace in said County of Cumberland, and their associates, for and in trust for said County, 1½ acres of land in the lot No. 60." Then follows a description of the land and, *(habendum,)* "to have and to hold," &c., "to them, the said E. Barron, W. Black, and C. Baker, and their associates and successors in office, for and in trust for the said County of Cumberland, forever." He then covenants for himself and his heirs, &c., "for ever to secure and defend" the grantees and their associates and successors in office, in the peaceable possession of the premises. The Act of 1848, chap. 28, after reciting the fact that such a deed had been executed for the purpose therein mentioned, and that a new *Court House and Gaol had been erected upon the land*, and that, in consequence of the death of all the trustees named in the deed, it was advisable that new trustees should be appointed and empowered to take charge of such land and buildings, enacted that the Grand Jury and Sessions should appoint trustees who, and their successors, were to be a body corporate by the name of "the Trustees of the Amherst Court House grounds," with power to sue and be sued, &c. Section 2 of that act provides that the legal estate and title of and in the said lands and buildings thereon, then or thereafter to be erected, should become and be vested in such trustees for the purposes originally intended in and by such deed. It is also provided that nothing in the act contained should extend or be construed to extend to deprive any person or body politic or corporate of any right, interest, property, or possession, in him or them by law vested or being, and that the act should not interfere with the *necessary management and control thereof being vested in the High Sheriff* of the County for the time being. The last section gives it force for six years, and then to the end of the next session of the General Assembly. In 1851, and before the act of 1848 had expired, the first edition of the Revised Statutes was published, which, by chapter 97, provided for the appointment by the Grand Jury and Sessions in each county, of trustees, to be called "the Trustees of Public Property for the County (or District) of ———," creating them a body corporate by that name. The second section of that act vests in such trustees "all lands *granted, conveyed, reserved, or dedicated, or which may have been procured, or, for twenty years*

before the passing of this chapter, shall have been used for public purposes in the county or district, whether for the site of any court house, jail or lock-up-house, or for the public purposes of the county or district generally," &c., &c. The last part of section 9 declared that the provisions of that chapter should not affect any lands or buildings *then vested in trustees*, or the *necessary control of the Sheriff over the court house and jail.* That chapter was subsequently reënacted, so far as it affects this question, in each successive series of the Revised Statutes, and is now embodied in the last series. But for the provision in sec. 9, chap. 97, Revised Statutes, 1st Series, already referred to, I do not think it could be denied that the effect of that chapter would be to vest the property in question, immediately, in the Trustees of Public Property. Under that section, however, it is clear that while the act of 1848 had remained in force, and the trustees named in it were capable of holding the property, it could not vest in the Trustees of Public Property, under the chapter of the Revised Statutes referred to; but I think it cannot be reasonably doubted that it did vest in them the moment that the Act of 1848 ceased to have effect,—the language of the Revised Statutes being so very comprehensive that, even although, as it was contended, the land may not have been conveyed in fee by the deed to parties capable of so taking and holding it, yet it vested in the trustees if it was "*reserved,*" or "*dedicated,*" or "*procured,*" or if "*for twenty years previously* it had been *used for public purposes* in the county, whether for the site of a court house, jail, or lock-up-house, or any other public use of the county."

The land in question, as we have seen, was deeded for the public use of the county in 1788,—sixty-three years before the passing of the first series of the Revised Statutes, and proportionately longer at the different periods of passing each subsequent series of that work. The deed itself gave the constructive possession of the property to the grantees, who used it for county purposes, as is shown by the recitals in the act of 1848, by which it appears that a court house and jail had been erected upon it. It cannot fairly be contended that the property was not "dedicated," "reserved," or "procured," or "had" not "been for twenty years" prior to the passing of

each series of the Revised Statutes, or of one of them, used for public purposes, as mentioned in the statute; and, if so, it vested in the trustees. The defendant, in his evidence, says, that he took possession of the office in 1859, and carried on his business as Sheriff in that office for two years. His own possession alone would not give him a statutory title, and he has to rely upon his deed from Chandler, and upon the alleged fact that the county, or rather the trustees, *were out of possession over twenty years* before action. But the second series of the Revised Statutes was passed in May, 1858, containing the provisions to which I have already referred, and vesting absolutely the title to the property in the trustees subsequently appointed within twenty years before the commencement of this suit. But even if that were not the case, I fail to see how the defendant can show that the trustees who were regularly appointed under the different statutes, as admitted at the trial, were out of possession for twenty years, so as to divest them of the right to bring this action. Sheriff Chandler held the possession as Sheriff, and his son paid rent for it up to 1851. On the appointment of the defendant as Sheriff, late in 1858 or early in 1859, he took possession from the son of the former Sheriff. It would be quite proper, in view of the different statutes already referred to, which gave the Sheriff the necessary control over the court house and jail, to enquire whether or not the possession of the defendant, while he was Sheriff, and of his predecessor in office, had been in law for the county, even if trustees had not been appointed, but it is not necessary to do so, as he voluntarily accepted the office of trustee of the property, and acted as such from 1862 to 1875, when the plaintiffs were appointed. Principle alone would show that a trustee cannot be permitted by the exercise of the trust, to deprive the *cestui que trust* of his legal or equitable rights. If his own interests were inconsistent with the discharge of his duty as trustee, and if he meant to prefer the former to the latter, his clear duty was to have so informed the *cestui que trust*, in order that he could be removed from the position, as the law provides, or otherwise be ejected from the premises. But the plaintiffs are not obliged to rely upon principle alone to fortify that position, as the authorities upon the point are numerous and decisive.

Before, however, referring to these authorities, it is proper to mention that it was contended on behalf of the defendant that if the plaintiffs were out of possession for over twenty years, they cannot recover in this action, even against a party in possession who cannot show twenty years possession in himself. *Darby* v. *Bosanquet*, p. 390, and the various authorities there cited go far to sustain that view; and *Doe e d. Carter* v. *Barnard*, and *Doe e d. Goody* v. *Carter*, 9 Q. B., N, S., 863, 868, *(n.)*, are authorities which go very far in that direction. Of course that was not law in this Province, prior to the time that our present statute of limitations came into operation at least, and the question as to how far it affects this case depends upon the other questions already referred to, whether or not the defendant, while he was acting as trustee of the land in question, was, *in law*, occupying for himself, or whether his possession was, from a legal point of view, that of the *cestui que trust*. *Perry on Trusts*, sec. 863, says, that "the relation and privity between trustee and *cestui que trust* are such that the possession of the one is the possession of the other, and that there can be no adverse possession during the continuance of the relation." For this position numerous authorities are cited, both English and American, and he says that no trustee, while occupying a place of trust and confidence, should be allowed to set up an adverse title, and that this rule applies to all acting as trustees, whether regularly appointed or not. In *Merriam* v. *Hassam*, 14 Allen, 522, HOAR, J., said that "the possession of the trustee not being adverse to the *cestui que trust*, as between them there is no limitation of time, unless there is a *clear repudiation* of the trust brought home to the party, *so as to require him to act* upon a *clearly asserted* adverse title." Again, *Bigelow on Estoppel*, p. 413, after referring to the law by which a mortgagor is estopped from denying the title of the mortgagee, unless, after a distinct disclaimer brought to the knowledge of the latter, he has acquired a title by adverse possession, says; "and the principle seems to prevail in cases of those trusts which are the mere creatures of a Court of Equity, the possession of the trustee not being adverse to the *cestui que trust*, unless there is a clear repudiation of the trust brought home to the party," &c. Regarding this as good law, which I have no doubt it is, I am of opinion that the

defence set up by Mr. Kerr on that point cannot prevail, because he certainly did not repudiate the trust, but acted as trustee for thirteen years; and if it be true that, without such repudiation, the possession of the trustee is that of the *cestui que trust*, then we find the plaintiffs in possession during all the time that the defendant and his associates were trustees from 1862 to 1875. Besides, that question was clearly and distinctly left to the jury, and they found it in favor of the plaintiffs, as I think they ought to have done.

It is quite true that *Decouche* v. *Savetier*, 3 Johnston's Ch. Rep., 190, shows that where a person takes possession of property in his own right and is afterwards by *matter of evidence or construction*, changed into a trustee, lapse of time may be pleaded in bar. The Court said; "There is a class of cases which admit a reasonable time to be a bar, but these are cases in which a party is *turned* into a trustee *by matter of evidence merely*, and who took possession originally in his own right, and was *prima facie* the owner. Thus the *fraudulent purchaser* of a lease-hold estate from an executor was not permitted by Lord KENYON to be turned into a trustee for the children. And in *Beckford et al.* v. *Wade*, 17 Vesey, p. 97, it was held that, though *no time bars a direct trust*, as between *cestui que trust* and trustee, a person is not allowed to defeat the operation of the statute by making out a *constructive* trust, at any distance of time, and after the facts and circumstances out of which it arises happened, and where it is perfectly clear that the relief would have originally been given on the ground of *constructive* trust in a Court of Equity. That is not this case. *Hill on Trustees*, at page 464, takes the same view and says that in cases of trust by implication or construction of law the possession of the trustee is "usually, to a certain extent, adverse to the *cestui que trust*, for it rarely happens that such a trust is expressly recognized or admitted by the parties." (See also *Collard* v. *Hare*, 2 R. & M., 675.) No doubt that is quite true, and the distinction drawn is very clear between a constructive and a direct trust, and fully illustrates the mistake of applying to the one case the same rules of law that are applicable to the other. Perhaps the strongest case in favor of the plaintiffs, upon the point now under consideration, is that of the

Attorney-General v. *Munro*, 2 DeG. & S., 163, in which the Vice-Chancellor in a long and elaborate judgment, said; "Now, I apprehend it to be conformable to the principles of equity and to the course of decisions in this Court, as well as in the Court of Chancery in Ireland, that where a person knowingly and expressly acquires the possession of property as a trustee merely, *or being in possession makes himself by contract, expressly and without qualification, a trustee of it*, he cannot, upon any notion of remitter or otherwise, be allowed effectually to assert against the trust any title (paramount and adverse to the trust) which *he may himself have*. That he is wholly and finally to lose the benefit of that title I do not say, but he must assert it, if at all, *without deriving*,—he must assert it *so as not* to derive any advantage for it from the possession which he has as trustee or had in that character." See also *Perry on Trusts*, sec. 433, and *Ellis* v. *Barker*, L. R., 7 Ch., 104. Can it be supposed for one moment that if the defendant in this case had done as the law says he ought to have done, in the event of his holding adversely to his co-trustees and his *cestui que trust*, that is to say, repudiated the trust and declared his intention, he would have been permitted to remain for so long a time in office and in the possession of the land in question? This is not the case of a constructive trust in which, as has been correctly said, the possession of the trustee is usually adverse to the *cestui que trust*, but one of a trust like that under a contract, because, although the defendant's appointment was under a statute, yet it was voluntarily accepted and acted upon without any obligation to do so on the part of the defendant. See *Stone* v. *Godfrey*, 5 DeG. McN. & G., 76. Although in the view I take of this case, the statutes referred to render it unnecessary for the plaintiffs, under the facts in evidence, to show that the deed alone passed the fee simple, it may be proper to say that the case cited on that point on behalf of the defendant (*Nightingale* v. *Goulburn*, 5 Hare, 484,) does not appear to me to aid him. It is true that the head note is as the learned counsel stated, but the very first part of the judgment states the real question to be whether the bequest could be supported *as a charitable* bequest, or whether the property comprised in it was undisposed of, and, as such, distributable among his next of kin.

It was objected at the argument that the *locus* was not sufficiently identified, but I am of a different opinion. Job Seaman testifies that "the lot in dispute is included in the writ." Again, he says; "the land described in the *Freeman deed* is the same as that described in the writ, and the same land upon which the Court House stands." He was one of the trustees appointed in 1849 or 1850, under the Act of 1848, and he says that about a month after his appointment he and his associates got Mr. Logan, a crown land surveyor, to survey the lot. The late Joshua Chandler, who was the Sheriff, and who, by the statute, had certain control over the property, though not for his own use, was present and pointed out to Logan the starting point. This witness says that the survey included the place in dispute. The late Sheriff's son, Charles Chandler, was then in possession, and paid rent for it in full up to 1850 or 1851. Samuel O'Donnell, who was a surveyor, made a survey of the property in 1857, from the description in the Freeman deed, and he proves that it covered the land in dispute. On cross-examination, he said that if he did not start at the right place, his survey would be wrong, (which of course cannot be questioned), but he added that he knew he had started at the right place.

The action was first brought in the names of Job Seaman, Thomas R. Black, and William Oxley, Trustees of Public Property for the County of Cumberland, and, at the trial, a motion was made to amend the declaration, which motion was granted. At the argument it did not appear what amendment was made, but the learned Judge who tried the cause handed me the issue roll, as amended at the time, and I find that, as it stands, the defendant is summoned to appear at the suit of the Trustees of Public Property and the Trustees of the Amherst Court House Grounds for the County of Cumberland, who say that the said James J. Kerr withholds the possession to which the said Trustees of Public Property and the Trustees of the Amherst Court House Grounds, or *either* of them, claim to be entitled, &c. The real plaintiffs, the Trustees of Public Property for the County of Cumberland, are sufficiently described, but it was a mistake to join "the Trustees of the Amherst Court House Grounds," as there was, at the time, no such body in existence. It is, however, mere sur-

plusage, and may be rejected as such. Our Practice Act provides that, in an action of ejectment, the writ may claim that "some or one" of the plaintiffs named in it is entitled to the possession, &c., and, by section 94, "the joinder of too many plaintiffs shall not be fatal to any action, but the plaintiff or plaintiffs entitled may recover"; and I am of opinion, that judgment ought to be entered here in favor of the "Trustees of Public Property for the County of Cumberland," against the defendant. It is only necessary to add that, at the argument, much stress was laid upon the fact that the Act of 1848 saved the right of "any person, body politic, or corporate, &c." but the subsequent acts contain no such saving clause; and, even if they did, I do not see how the defendant could profit by it, as he failed to show the existence "of any person, body politic, or corporate," other than the plaintiffs, who could assert any right to the property after the execution of the deed by Freeman, nor did he attempt to prove that he claimed under any such parties. He got possession of the property while he was Sheriff of the County, and, as such, had by statute the necessary control of the Court House and jail. He took a deed of it from the son of his precedecessor in office, who occupied it formerly by virtue of his office as Sheriff. He says he took the deed because the former Sheriff, who himself ought to have guarded the interests of the county, conveyed to him the impression that the title could not be proved, but this was a couple of years after he had occupied the building as a Sheriff's office. Whilst having that deed, he undertook to act as trustee of the property for the county, and so acted for thirteen years, without ever disclosing or intimating to his co-trustees or the *cestui que trust* any design on his part to hold the land adversely to their rights. If one can make out a legal title to lands in that questionable way, my view of the law governing such cases, is very far from being correct.

HARRIS *v.* WALLACE.

RITCHIE, E. J., when at the Bar, had been professionally consulted in reference to the suit which was afterwards instituted by bill in equity, and on that account had at first declined to act in the matter, but had afterwards, to facilitate matters, undertaken to sign any merely *pro forma* orders in the cause, and had, with this understanding, signed an order to appoint an examiner to take evidence. On appeal from this order, *Held*, that under R. S., cap. 95, s. 6, which went farther than the English rule, the Judge was disqualified, and the order must be set aside.

THIS was an appeal from an order of RITCHIE, E. J., for the appointment of an examiner, on the ground, among others, that the Judge in Equity had been professionally concerned in the cause, and was therefore disqualified from acting in the matter.

RITCHIE, E. J., on the reading of the papers, explained that he had been consulted in reference to the suit by the original plaintiff, but had taken no part in the matter otherwise, that he had mentioned this fact to the parties, and had refused at first to have anything to do with the cause, but afterwards, finding it almost impossible otherwise for the suit to be advanced, he had told Mr. Wallace that he would sign any merely formal order in the cause. Mr. Wallace, he thought, had obtained an order from him in the cause with this understanding, and in granting the order he had said to Mr. Wallace, "I will give you this order, but you must expect that I will give orders to the other side as well."

Wallace, for appeal.—The 6th clause of the Equity Act, R. S., ch. 95, prevents the present Equity Judge from exercising jurisdiction in this cause, because he was professionally concerned in it. *1 Knapp's Ap. Cases*, 376.

RITCHIE, E. J.—I shall be glad if my brethren come to the conclusion that I cannot act in this cause. That is really the only point here.

Bligh, contra.—The whole question here is one of practice. The order to appoint an examiner is a matter of practice, and no appeal from it lies. From *Daniel's Ch. Pr.*, 1462, it would seem as if every interlocutory order was a matter of practice. As to the jurisdiction of the Equity Judge here, see *7 H. of L. Cases* 429.

RITCHIE, E. J.—The question on which we would like to see cases is, whether the fact of Mr. Wallace having taken orders from the Equity Judge gives jurisdiction by waiver or otherwise.

Johnstone, Q. C.—Mr. Wallace is estopped from raising this point, having altered our position by himself taking out orders from the Judge in Equity.

SIR WILLIAM YOUNG, C. J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This appeal, from an order of the Equity Judge, was found upon the opening to be an off-shoot of the old case of *Werner* v. *Wallace*, the plaintiff, Harris, being the administrator of Werner. This is the sixth appeal that has been before us, four of which were heard together and decided in 1871. They turned almost wholly on points of practice having little or no bearing on the merits of the case which are still in abeyance, though the action was brought so far back as the year 1869, and a large sum of money is charged as having been paid to Wallace and DeChair upon trusts not yet fulfilled. Judging from the past, I should say that it will require a keen and logical intellect and a resolute purpose in the counsel who may be employed to bring this case to a conclusion. The fifth appeal was heard in December term, 1875, and was dismissed, and the present, being the sixth, was granted in June, 1877, and was argued in the recent term.

Mr. Justice WILKINS having delivered an elaborate judgment in October, 1873, on a demurrer to the writ and amended writ, which was allowed on the sole ground of one Sneathem, not having been made a party, an amendment was granted without costs. Mr. Bligh in 1874 was substituted for Mr. Oldright as attorney for the plaintiffs. An amended declaration was filed and served on Wallace in February, and on DeChair in April, 1875, and a default marked against both. The default against Wallace was subsequently taken off, and he put in an answer under oath in May, 1876. So it appears by the answer on file, but Mr. Bligh states in his affidavit that there was a previous demurrer by Wallace, which was argued and dismissed with costs, but which is not on file, and that the answer was served on him on or about the first of May, 1877.

And now comes the ground work of the present appeal, being an order of the Equity Judge, June 5th, 1877, for the appointment of a master to take evidence in the cause.

The main grounds of appeal, as appeared very clearly upon the argument, were matters of practice from which no appeal lies by the law as it now stands, and the sole question turned upon an allegation in Wallace's affidavit of 5th June, 1877, that the Equity Judge, before his appointment as such, was professionally concerned in the cause. The Judge who sat with us, under the statute, stated that he had been so concerned many years ago, and had made it known that he would take no part in the argument or decision of the cause, but at the instance of Judge WILKINS, and to avoid delay, would sign any *pro forma* orders. This objection, under the English practice and decisions, would not prevail. *Broom's Legal Maxims*, 4th edition, 121; *3 H. L. Cases*, 787; *5 H. L. Cases*, 88. In *Thelusson's case*, 7 H. L. Cases, 528, the Lord Chancellor, who had been counsel for one of the appellants, heard the whole argument, and stated that he would take no part in the decision, unless there was a division of opinion, thus asserting the right. But the 6th section of our Act, R. S., ch. 95, goes farther than the English rule, and provides that questions in Equity in which the Judge in Equity may be interested or may have been professionally concerned, shall be brought before one or more Judges of the Supreme Court, according to the nature of the case.

This explicit declaration, my colleagues and I think, binds us, and, however little respect we have for an objection so taken and so urged, it must prevail, and the order appealed from will be set aside, but without costs. What effect this may have on the proceedings that have been taken under it, we do not at present decide.

ANNAND *v.* THE MERCHANTS' BANK.

A CHECK, payable to the plaintiff, or order, was mailed to the plaintiff's address, but he did not receive it, and it appeared that a few days afterwards a young man whom plaintiff had previously dismissed from his employ had brought the check, with the plaintiff's name endorsed on it, without authority, to the Bank, and had drawn the money. Plaintiff's attorney wrote to defendants demanding the money but not the check, and defendant's attorney replied that if plaintiff would write a letter to the Bank declaring the endorsement a forgery, and stating that he would be prepared to give evidence if required, the amount would be paid. Plaintiff's attorney then wrote to defendant's attorney asking that defendants would pay or restore the check. The check was handed by the Bank to the plaintiff on condition that he would return it, which he did, but it was not delivered to him as his own property.

Held, that the demand to pay or restore the check was a sufficient demand of the check, but that plaintiff had no such property in the check and no such possession of it as would entitle him to maintain the action, and, even if he had, that the defendant's refusal was not such an absolute refusal as to constitute a conversion.

Q. Whether under the County Court Amendment Act of 1877, c. 6, s. 25, giving an appeal where the judgment is over $40, it is sufficient that there should be a judgment for costs to that amount.

THIS was an appeal from the decision of JOHNSTONE, J., of the County Court, in an action of trover to recover a check. By the judgment of the Court below the plaintiff was nonsuited, and a preliminary objection was taken that there was no appeal, inasmuch as by the statute, cap. 6 of 1877, sec. 25, an appeal from the County Court was given only where the judgment was over $40.

Meagher, contra, contended that this was absurd, as, if the contention was sound, there was no appeal from a judgment for defendant at all; and further that the action had been brought under the statute of 1874; *6 Ad. & E.*, 943; *9 C.B.* 551.

SIR WILLIAM YOUNG, C. J., on the following day, said he had looked into the point raised against the appeal, but the other members of the Court had not had an opportunity to do so, and, therefore, he could only throw out his own opinions. He was perfectly clear that the Act of 1874 did not apply, and that the Act of 1877 had introduced a new system with reference to appeals, which superseded that established by the Act of 1874. The right of appeal had been very carefully laid down in a recent case by the Supreme Court of Canada. It was a purely statutable right, and must depend entirely upon the words of the statute. In the next place it had been decided by the majority of that Court, although Mr. Justice RITCHIE had thrown out some doubts, that the right of appeal, and statutes regulating that right, were matters of procedure, so

that, while the substantial rights of a party must be governed by the statutes in force at the time of issuing the writ, (*6 A. & E.*, 943,) subsequent enactments were applicable to the case, if they related to appeal.

Now, as to the amount of the judgment below, he quite acquiesced in the view presented yesterday that it would be a strange thing if a man was shut out from appealing because the amount of the judgment was not $40; but that was a matter for the Legislature and not for the Court. In this case there had been a non-suit, and the judgment was only for costs. In the Privy Council costs were not permitted to be added in order to make up the appealable amount. This Court had looked into that thoroughly in the case of *Pope* v. *The Pictou Steamboat Co.*, 2 Oldright, 176, but as the judgment in that case, without the costs, was very near the appealable amount, they had allowed the appeal, leaving that question to be settled. In the present case the Court would hear the argument, reserving the question as to the right of appeal.

The cause was argued by *Meagher* for appellant, *Ritchie, Q. C.*, contra.

McDONALD, J., now, (April 23rd, 1878,) delivered the judgment of the Court:—

It is clear that the plaintiff cannot recover under the money counts in his declaration, and we must, therefore, enquire whether or not he can recover for a conversion by the defendant to his own use, of the cheque in question, or for the alleged wrongful withholding of the same. The cheque was for a small amount, only nine dollars, but the law governing the case is the same as if the amount had been the largest that could come before the Court.

Messrs. Putnam Bros. drew a cheque on the defendant Bank, payable to the plaintiff, or order, and mailed it to his address. He, however, did not receive it, and it appeared at the trial that, a few days afterwards, a young man who had been a short time previously dismissed from the plaintiff's establishment, where he had been a servant or clerk, brought the cheque, with the plaintiff's name endorsed on it, without authority, to the Bank, and drew the money. The plaintiff, in his evidence, proved that he demanded the amount of the

cheque from the Bank, but did not say that he demanded the paper itself. His attorneys, Messrs. Meagher & Chisholm, by letter addressed to the Bank, also demanded the money, but not the cheque. To this letter, Messrs. J. N. & T. Ritchie, attorneys, acting for the Bank, replied, and Messrs. Meagher & Chisholm subsequently wrote to them, asking that the defendants should pay or restore the cheque. It was objected that this was not a sufficient demand, but I am of opinion that it was.

The Messrs. Ritchie replied, to the first demand, that if Mr. Annand would write a letter to the Bank declaring the endorsement a forgery, and stating that he was prepared to give evidence, if required, the amount would be paid; but he declined to do so. Whether or not this qualified refusal to pay the money is sufficient evidence of a conversion, is a question to which I shall presently refer.

The cheque was handed by the Bank to the plaintiff on condition that he should return it, which condition was afterwards complied with; but it was not delivered to the plaintiff as his own property,—so that, in point of law, although he had the temporary custody of it, he never had it in actual possession as his own property.

In this form of action, mere possession of property entitles the plaintiff to recover against a wrong-doer, but the defendant Bank is not a wrong-doer, and, to enable the plaintiff to recover here, he must prove a general or special property in the subject matter of the suit, an actual or constructive possession or right of possession, and a wrongful conversion by the defendant.

I do not think there can be any doubt that, if the plaintiff had received the cheque, in due course, by mail or otherwise, before it was taken to the Bank by the party who received the money upon what is said to be a forged endorsement, he would have had such property in it, and such possession of it, as would have entitled him to recover, if the fact of conversion had been established. The case of *Oliver* v. *Oliver*, 11 C. B., N.S., 139, cited on behalf of the plaintiff, goes no further than to establish that law, and it differs very much from this case, inasmuch as, there, the paper in question—the letter—had been actually delivered to the party to whom it was addressed, while, here,

there was no actual delivery at all. It was urged on behalf of the plaintiff that, where there is an immediate sale, and nothing remains to be done by the vendee, the property in the thing sold is vested in the latter as in *Martindale* v. *Smith*, 1 Q. B., 389; *Benjamin on Sales*, 232. That, no doubt, is true, but I fail to see the application of it here, as there was no evidence whatever at the trial of a contract of sale or any contract between the plaintiff and Putnam Bros., so that the former was at perfect liberty to ignore all that the sender of the cheque had done or proposed to do, if he proposed anything.

Johnston et al. v. *Windle*, 3 Bing. N. C., 225, is not like this case, as there the note was stolen from the actual custody of the plaintiff by his clerk, and found in the possession of the defendant, while in this case the plaintiff never had the actual coustody of the paper as his own.

It is true, as stated at the argument, that a contract may be agreed to and made binding by the posting of a letter declaring the acceptance of a proposal, and the sender is not accountable for casualties occurring in the Post Office, as was decided in *Dunlop et al.* v. *Higgins et al.*, 1 H. L. C., 381; but this case turns, not upon the question whether or not there was a contract entered into by correspondence, where no actual delivery was necessary to the validity of such contract; but the question is whether or not the subject matter of the suit came into the possession of the plaintiff, either actually or constructively. There is a wide difference between concluding a contract by correspondence through the Post Office, and the delivery of the subject matter of the contract. But here there is no evidence even of a contract by which the senders, Putnam Bros., were bound to send the cheque or by which the plaintiff was bound to accept it. I think, therefore, that the plaintiff had no such property in the cheque, and no such possession of it as would entitle him to maintain this action.

But, even assuming that he had, I fail to see that there is sufficient evidence of conversion. It cannot be pretended that there was an actual conversion of the cheque, and the plaintiff, so far as that point is in question, must rely upon the demand and refusal. The refusal necessary to afford evidence of a conversion must be absolute and unqualified, *Philpott* v. *Kelly*, 4 N.

& M., 611; 3 A. & E., 106; and if this case had been tried by a jury the proper question to be left to them would have been whether the defendant had a *bona fide* doubt as to the plaintiff's right to the possession of the property, and, if so, whether a reasonable time had elapsed for clearing up the doubt; *Burroughes* v. *Bayne*, 5 H. & N., 296, 308. The learned Judge of the County Court who tried the cause had to discharge the functions of a jury as well as those of a Judge, and, he having decided the question of fact in favour of the defendant, we are not at liberty, under our law, to say whether or not he did so against the mere weight of evidence, so long as there was evidence which could legally have been submitted to a jury if the cause had been tried in that way.

Where the real owner demanded goods and the defendant refused on the ground that they had been attached in his hands by a foreign attachment against a third party from whom he had received them, it was held that there was no conversion. *Verrall* v. *Robinson*, 2 C. M. & R., 495. In *Green* v. *Dunn*, 3 Camp., 215, (note,) which was trover for timber found on defendant's premises, when the plaintiff demanded it, the defendant said; "If you will bring anyone to prove it as your property, I will give it to you, and not else." Lord ELLENBOROUGH said; "This is a qualified refusal, and no evidence of conversion;" and the plaintiff was non-suited. So, in *Clark* v. *Chamberlain*, 2 M. & W., 78, it was held that the defendant was guilty of a conversion for detaining the plaintiff's anchor and hawser until salvage was paid to the party who took them, but as there was room to question the right to salvage, it was said by the Court that if the defendant had said; "I do not know whether salvage is due or not, and I shall keep them till that is ascertained," the plaintiff could not recover.

It appears to me that a person having the honest custody of property claimed by the rightful owner, when there is reasonable doubt of such owner's right to the immediate possession, may refuse to deliver it up till a reasonable time has elapsed to enable the custodian to clear up the doubt, or until the owner does so, if the facts are exclusively within his knowledge. In this case the Bank had, honestly, the custody of the cheque, and did not absolutely refuse to deliver it up, but

only in a qualified way, which, in my opinion, is no evidence of conversion. The request made, I think, was quite reasonable and very easy to be complied with by the plaintiff, much easier than was held to be justified in *Green* v. *Dunn*, already cited, where the defendant was required to bring a third party to prove property, which in many cases would be difficult to do. If the endorsement on the cheque was a forgery, the plaintiff was the only one who knew it besides the guilty party, and he should have said so unequivocally in writing, so that the Bank could safely have proceeded to prosecute the forger. If it was not forgery,—if the plaintiff's name was used with his consent, express or implied, by a person to whose acts in dealing with the Bank he had so recently given his sanction, and whom he accredited by allowing him to get his bills cashed there, so that, in case of a prosecution for forgery, the culprit might be acquitted, the plaintiff and not the Bank ought to bear the consequence.

I am of opinion that the judgment of the learned Judge of the County Court who tried the cause ought not to be and cannot be disturbed.

It may be added that, by chapter 6 of the Acts of 1877, sec. 25, an appeal from the the County Court is given only where the judgment is over $40. Here nothing was adjudged to be due; but it was suggested that if the costs amounted to over $40, the case would be appealable. Without deciding that question, it may be stated that the costs below not having been taxed, there is no evidence of a judgment for over $40, even in that view of the case.

THE TOWN OF PICTOU *v.* McDONALD.

Writ of certiorari quashed, the affidavit on which it was issued not disclosing sufficient grounds, and there being no return to the writ.

IN this case a rule *nisi* was obtained to quash a certiorari to remove a conviction before Justices on a charge of selling intoxicating liquor contrary to law. The grounds on which the rule was based appear at length in the judgment of the Court.

Henry, for rule.—The defendant should have shown that he could not appeal from the conviction; *Rex* v. *Whitbread*, Dougl., 550. (DESBARRES, J.—We have decided so,—that a party having an opportunity to appeal must avail himself of it, and, if he does not, certiorari will not lie.) There is no return upon the writ of certiorari, and nothing to show where these papers came from; *1 Dowl.*, 310; *4 B. & C.*, 401; *Paley on Convictions*, 298, 299. Our statute provides that the writ should have an endorsement of the date when allowed by the Commissioner.

Rigby, Q. C.—If there is no return the plaintiff cannot succeed in this motion, because his affidavits are improperly headed. They are headed in the Supreme Court, Pictou, with the name of the cause. There is no cause here if there is no return. *Fisher's Dig.*, 1532. Affidavits to be used on moving to quash a certiorari improvidently issued should not be entitled in the cause. The motion should have been to compel the Magistrate to make a return; *King* v. *Kempton*, 6 B. & C., 640; *Reg.* v. *Fordham*, 11 A. & E., 80. The defendant confessed, and therefore could not make the necessary affidavit. *2 Lord Raymond*, 1203; *In re Peter Ross*, 2 R. & C., 596.

Henry, in reply.—As to the heading of the affidavits that is settled by *Crawley* v. *Anderson*, (ante p. 37,) where it was decided that after the certiorari was issued the affidavits must be headed in the cause. The defendant is estopped from using that argument, as his own affidavits are headed in the same way. There is nothing to show that the defendant could not have appealed. He should have set out definitely that he could not make the affidavit necessary for an appeal. Besides, his inability to make such an affidavit is no ground for allowing a certiorari. See as to the heading of affidavits, *Allen* v. *Caswell*, 1 Oldright, 405.

DESBARRES, J., now, (April 23rd, 1878,) delivered the judgment of the Court:—

The defendant, upon his own confession, was convicted on the 25th July, 1876, before Daniel Hockin, Stipendiary Magistrate of Pictou, of the offence of selling intoxicating liquors contrary to law, and fined in the sum of eighty dollars and costs, it being for the fourth offence. On the fifth of August

following, a writ of certiorari was issued upon an affidavit of defendant and directed to the said Daniel Hockin, commanding him to send to the Supreme Court at Pictou the plaint in this cause, with all things touching the same, together with said writ. The cause was entered on the docket of summary and appeal causes, for the sittings at Pictou in October, 1876, together with several other cases of the same nature, none of which were tried. It was again entered on the docket for the sittings of said Court at Pictou in June, 1877, when it was agreed by the counsel on both sides that a case should be made and entered into for the opinion and judgment of the full Court at Halifax, as well in this case as in all the other causes of like nature then pending and undetermined in said Court at Pictou. No case having been agreed upon in consequence of a misunderstanding between the counsel as to the points to be submitted to the Court, a rule *nisi* was moved for on the part of the plaintiff, and granted by the Court on the 20th January, 1878, to set aside and quash the said writ of certiorari and the order therefor, on the following grounds, viz.:—

1. That the affidavit on which the said writ of certiorari was allowed did not disclose any sufficient ground for the issuing of the same.

2. That defendant, having a right of appeal from the judgment of the said Stipendiary Magistrate, ought to have applied for an appeal and not resorted to the writ of certiorari to set aside the conviction.

3. That defendant had taken no step in the cause in this Court, and was guilty of laches.

4. That the Magistrate to whom the writ of certiorari was addressed had made no return thereto, as he was commanded to do.

The cause was argued before us under the rule in February last, and it appeared on the examination of the said writ that the Magistrate had made no return thereon. The Court at the time expressed the opinion that the fourth objection was fatal, and that the writ ought to be quashed; but, it being contended by defendant's counsel that the facts disclosed in the affidavits on the part of the defendant shewed that that plaintiff had waived this objection, we took time to examine these affidavits, and

having since carefully read them, we are of opinion that they contain no facts whatever amounting to a waiver of the objection taken for want of a return being made to the writ. We also think there was no sufficient ground stated in the affidavit of defendant to warrant the allowance of and the issuing of the writ of certiorari in this case; and that the insufficiency of that affidavit furnishes good ground of itself for quashing the writ. The defendant was convicted upon his own written confession of having violated the law for the sale of intoxicating liquors, admitting such act to be the fourth offence, and he seeks to set aside the conviction because he expected that the Magistrate upon such a confession would impose a fine for a first offence.

This is the whole case, and it is a striking illustration of the effect of giving to Commissioners the power of allowing writs of certiorari to be issued in all cases, a power which, though it may be a wholesome one in certain cases, is, as we all know, frequently abused. No Judge would have allowed a writ of certiorari on such an affidavit as was made by the defendant in this case, who asks the court to consider his own voluntary confession of the offence a nullity.

The rule for quashing the writ must be made absolute with costs.

THE QUEEN *v.* McKARCHER.

In an action on a bond to the Queen under chapter 75 R. S., "of Licenses," &c., an attorney was named on the writ, but it was not shown at whose instance, or for whose advantage the action was brought. The Court passed an order staying the action until plaintiff's attorney should endorse on the writ the name of the Clerk of Licenses, or such other person at whose instance the action was brought, to respond the judgment.

THIS was an action brought on a bond to the Queen, given under the chapter of licenses for the sale of intoxicating liquors. The action was brought in the name of the Queen, D. C. Fraser, Esq., of Pictou, being named on the writ as attorney; but it was not disclosed at whose instance or for whose advantage the action was brought. *Rigby, Q. C.*, obtained a rule *nisi* at Halifax to stay proceedings until a relator should be appointed. This rule was referred to the full Bench, and argued this term.

Rigby, Q. C., moving to make absolute the rule, cites *The Queen* v. *Humphrey*, 2 R. & C., 600. The statute says; "the Clerk of License or any other person" may bring the suit. We wish to know who it is that brings it.

Graham, contra.—Outside of our own Court there is not a single precedent in the reports of any country under the dominion of the Queen where, suing on a bond, she has been required to have a relator. The Queen always sues on a bond, and no one else. A relator is only had in equity or by statute at common law in the case of *quo warranto*. Although the Attorney General may require a relator, he can proceed without it in equity. *Story's Eq., Jur.*, 8. A relator is unknown to the common law. Story shows the practice in the Equity Court; but we are not in equity. Cites *1 R. & C.*, 58.

A motion was previously made in this case for security for costs, but was refused by JAMES, J. In that application they have sworn that it was by the Clerk of License, McGregor, that the suit was instituted.

By statute of Henry 8th, the filing of a bond to the Queen in Court is made a record, and *scire facias* issues on that. But in *Uniacke* v. *Dickson*, HILL, J., said he had never known a prerogative writ to be used here.

30 U. C., Q. B., 479, shows that the Queen could sue, although the Act enables the P. M. General to do so.

If the process of the Court has been abused, the proper course would be to set it aside. They have not done that, but on the contrary they have pleaded to the suit. The Queen here could sue on the bond independently of the statute.

Rigby, Q. C.—If I went to a Judge and asked for this to be set aside on the ground that it was not authorized by the Attorney-General, I would be met by section 89, which provides, that the Clerk of License or any private prosecutor may bring an action on the appeal bond without special leave obtained therefor. This section alters the common law, and in fact introduces a relator. All I want is to compel him to disclose himself.

Graham.—The statute does not contemplate a relator being put on the record. It would require an express statute to add a relator. There is no precedent for a relator being appointed

where the Queen sues on a bond. (YOUNG, C. J.—Suppose a private person sues under the statute, without the authority of the Attorney-General or Clerk of License, do you hold that the defendant has no remedy for costs.) Certainly not. Though I don't hold the ruling of the Judge in *Queen* v. *Humphrey* right, which required us to have a relator, yet I don't need to argue against that case here, as there were equitable pleas. The authorities referred to in the *Queen* v. *Humphrey*, 2 R. & C., 600, are from the equity practice where a relator is necessary, and from Stephen's Com., which refer to *quo warranto*, where a relator is necessary by "statute of Anne;"—*Jacob's Law Dic.*, "relator," and "*quo warranto*;" and in no case has a relator been required in a suit on a bond to Her Majesty. In twenty English cases on my brief the Queen sued without a relator, and in three Canadian cases, five New Brunswick cases, and one Jamaica case, cited in Moore's Privy Council Reports.

SIR WILLIAM YOUNG, C. J., now, (April 23rd, 1878,) delivered the judgment of the Court, deciding that an order should pass staying proceedings until the name of the person at whose instance the action was brought was placed on the record, and in pursuance of this decision the following order was passed:—

"On argument of the order *nisi* herein to stay proceedings on the part of plaintiff, and on motion, it is ordered that all further proceedings in this action be stayed until plaintiff's attorney do endorse upon the original writ herein the name of the Clerk of the License or such other person at whose instance this action has been brought and hitherto prosecuted, to respond to the final judgment, if any, that may be obtained herein by the defendants."

McDONALD *v.* POWER.

To a declaration by plaintiff for the price of one half interest in a horse alleged to have been sold by plaintiff to defendant, plaintiff retaining the other half interest, defendant pleaded among other pleas a set-off for the keep and care of the horse, and expenses connected with taking the horse to and from Truro, while the joint ownership lasted. The Judge of the County Court ruled that defendant could not offset his account, as that would be offsetting a partnership matter, depending upon an adjustment of accounts between the parties, plaintiff's claim being for property brought into the partnership.

Held, that the rejection of the set-off was wrong, and that the judgment below must be reversed.

THIS action was brought in the County Court, at Halifax, to recover the price of one half interest in a horse, alleged to have been sold to the defendant by the plaintiff. The defendant pleadad that the said half interest had been sold with a warranty as to the soundness and speed of the horse, of which warranty the defendant alleged a breach, tender of the horse to the plaintiff, and refusal to accept. Defendant also pleaded a set-off for the keep of the horse while the defendant and plaintiff were joint owners. An agreement was put in evidence between the defendant, the plaintiff, and one Delhaunty, whereby the defendant and Delhaunty became jointly owners of, and interested in, one half of the horse, upon the conditions therein referred to, but this agreement was found by the Judge of the County Court to have been rescinded, and plaintiff contended that a second sale had been made of the half interest to defendant alone. The evidence as to the terms and conditions of this sale was very conflicting.

The following is a memorandum of the judgment delivered by JOHNSTONE, J., of the County Court:—

I gave judgment for the plaintiff, on the ground that the defendant had not made out his plea of guarantee, and I thought the probabilities were with the plaintiff. The written agreement was cancelled. Defendant knew at the time of the verbal sale that the horse could not make the time said to be guaranteed, as also did the plaintiff. And the plaintiff could hardly be supposed to enter into an agreement bargaining that a horse should do what he knew he could not perform. I did not think there was sufficient proof of horse's action after said agreement was made. The horse was sent to Truro by defendant, not to see whether he came up to time, but

to improve his speed. I also thought that defendant could not offset his account in this action, as that would be offsetting a partnership matter depending upon an adjustment of accounts between the parties, plaintiff's claim being for property brought into the partnership.

An appeal was taken from this decision, and argued before DESBARRES, MCDONALD, SMITH and JAMES, J J., in February, 1878, by *Thompson*, for appellant, who cited as to the ques- of the set-off, *2 Q. B., N. S.*, 357, and *Meagher*, contra, citing *Fisher*, 7888; *5 B. & Ald.*, 93.

SMITH, J., now, (April 1st, 1878), delivered the judgment of the Court:—

This is an appeal from his honor Judge JOHNSTONE, in the County Court, District No. 1. It is an action brought to recover the sum of four hundred dollars, the price of one half share, or interest, in a certain horse, alleged to have been bargained, sold and delivered by the plaintiff to the defendant, at his request. The ordinary common counts are also set out in the declaration, The particulars are as follows:—

1876.	June 24.—To interest or share in the horse "Huglin".....	$400 00		
	Sept. " Cash.....	1 00		
				$401 00
	CR.			
	Sept. By cash in part payment.....		10 00	
				$391 00

To this the defendant pleads three pleas:

1st. That he was never indebted, as alleged.

2nd. That the half share, or interest, in the horse referred to in plaintiff's declaration, was bargained and bought by defendant from plaintiff on the express warranty and condition that the said horse was sound in wind and limb, and without blemish, and that the said horse had made, and was capable and able to trot one mile in two minutes and twenty-five seconds, and it was upon that express condition and representation that the said bargain was made, and defendant avers that the said horse was not sound in wind and limb, nor was he without blemish, nor had he made, nor was he capable of, and able, to trot one mile in two minutes and twenty-five seconds;

and that as soon as he discovered the breach of the said warranty and condition, he requested the said plaintiff to receive back the said horse at the risk and expense of the plaintiff.

3rd. A plea of set off, the particulars of which are:

To expense to and at Truro and return	$ 75 00
" Cash lent plaintiff	10 00
" Keep and care of horse	200 00
	$285 00

An agreement in writing under seal was put in evidence by the plaintiff, which fully sustains the terms and conditions, on which the said share or interest in the horse was transferred, as alleged in said second plea, but the contract, as contained in said document, is between the defendant, the plaintiff, and one Edward Delhaunty, and is dated the blank day of June, 1876. By this document the said Delhaunty and the defendant became jointly owners of, and interested in, one half of the said horse, upon the conditions therein referred to.

Under the evidence given in this cause, had the suit been brought by the plaintiff against the defendant and said Delhaunty, under the agreement, much difficulty might have arisen in considering the objection taken by the defendant's counsel below, as to the right to maintain an action in the form in which it is brought. But the plaintiff can only recover in this suit upon the ground of an abandonment or rescission of the written contract, and the substitution of another and subsequent one between the plaintiff and defendant alone. It is contended by the plaintiff himself that a second sale of the interest in one half the horse to Power alone, took place. The defendant admits this, but says it was on the terms of the previous written agreement, which is denied by the plaintiff; and Delhaunty says, "I did not continue to hold horse,—agreement broken up,—one reason, he did not go fast enough." If any doubt could possibly exist upon this point, in view of the evidence, the learned Judge has decided in the affirmative, for in his judgment he says: "the written agreement was cancelled." In *De-Bernardy* v. *Harding*, 8 Ex., 822, it was held that it was a question for the jury, under the circumstances, whether the special contract was abandoned. Necessarily, then, it

became incumbent upon the Judge to adjudicate, possessing, as he does, the functions of a jury, upon the nature of the new contract, and to ascertain how far the defendant had succeeded in respect thereof in sustaining his second plea. The testimony is certainly of a most conflicting and incongruous character, in reference to the terms on which the joint ownership of the horse was transferred by the arrangement which left out Delhaunty, and which was made between plaintiff and defendant *after* the speed of the horse had become known to both.

While I do not entirely agree with the learned Judge below, as to the probabilities being so much with the plaintiff, yet, if the evidence of the plaintiff is to be believed, in contradiction of that of the defendant, corroborated as it is to some extent, by McLeod, and strengthened, to my mind, largely, by the whole circumstances of the transaction, I do not think this Court can at all interfere with the conclusion arrived at by the learned Judge, that the defendant had not sustained his plea. The decisions of this Court and recent English cases establish the principle that we cannot disturb the judgments of the County Courts proceeding solely upon questions of fact. Whether the learned Judge was right, however, in deciding as he did, that the defendant could not offset his account in this action, on the ground that it arose out of a partnership matter "depending for its settlement on an adjustment of accounts between the parties, and plaintiff's claim being for property brought into the partnership," is, in my mind, far from being clear. In the case cited at the argument, *2 Q. B., N. S.*, 357, one of the learned Judges differed to some extent from his brethren, on the facts of the case, similar in principle to those in the one before us, as to whether a partnership was created between the parties. COCKBURN, C. J., said, " the fair result of the evidence is that there was no partnership between plaintiff and defendants in the horse in question. They were owners in common—part owners, but not partners, in the ordinary sense of the term. CRESWELL, J., assumes a partnership. CROWDER, J., thinks it very doubtful whether there was any partnership at all between the parties; but all the Judges concerned in the decision agree that the payment made by plaintiff for the purpose of keeping, train-

ing and running the horse, and of putting him in a condition to win the stakes, could be recovered from the defendant, as capital advanced, in a Court of law. In view of this case so directly parallel with the one we are considering, and of the principles of law generally governing questions of partnership, I am of opinion that the learned Judge was wrong in rejecting the defendant's set off, and that the judgment must consequently be reversed.

FOSTER *v.* ROOME.

PLAINTIFF'S affidavit for the issue of a writ of attachment under the Insolvent Act of 1875, followed the requirements of the statute, section 9, setting out as grounds for the belief that the defendant was insolvent, the facts that he had called a meeting to compound with his creditors, had exhibited a statement showing his inability to meet his liabilities, and had otherwise acknowledged his insolvency, (sec. 2, *a*.)

Held, reversing the decision of JOHNSTONE, J., that the affidavit was sufficient.

THIS was an appeal from a décision of the Judge of the County Court for District No. 1, setting aside a writ of attachment under the Insolvent Act of 1875, issued by the plaintiff against the defendant. A previous writ between the same parties had been set aside and a second one issued on a fresh affidavit. The argument and decision turned largely upon the sufficiency of this affidavit, which was as follows:—

INSOLVENT ACT OF 1875, AND AMENDING ACTS.

CANADA,
Province of Nova Scotia,
COUNTY OF HALIFAX.

In the County Court and Court of Insolvency.

Miner T. Foster, of the City and County of Halifax, Merchant, Plaintiff,

vs.

William T. Roome, of the City and County of Halifax, Trader, Defendant.

I, Miner T. Foster, of the City and County of Halifax, Merchant, the above named plaintiff, being duly sworn, depose and say:—

1. I am the plaintiff in this cause, and the defendant is indebted to me in a sum provable in insolvency of not less

than two hundred dollars, over and above the value of any security which I hold for the same. The defendant is a trader within the meaning of the Insolvent Act of 1875, and amending Acts, and has his chief place of business in the County of Halifax.

2. The defendant is indebted to me in the sum of three hundred and seventy-six dollars and thirty-nine cents, Canada currency, for that the defendant, doing business in the city of Halifax under the name, style and firm of Roome & Co., on the seventeenth day of May, A. D. 1877, by his promissory note now overdue, promised under said name, style and firm of Roome & Co., to pay me the said sum of three hundred seventy-six dollars and thirty-nine cents four months after date, but did not pay the same, a true copy of which said promissory note is hereto annexed, marked "A."

3. To the best of my knowledge and belief the defendant is insolvent within the meaning of the Insolvent Act of 1875, and has rendered himself liable to have his estate placed in liquidation under the said Act, and my reasons for so believing are as follows:—1. Because he, the defendant, has called a meeting of his creditors for the purpose of compounding with them. 2. Because he, the defendant, has exhibited a statement showing his inability to meet his liabilities. 3. Because he has otherwise ackowledged his insolvency.

4. I do not act in this matter in collusion with the defendant, nor to procure him any undue advantage against his creditors.

And I have signed.

The learned Judge of the County Court set aside the proceedings, and an appeal was taken from his decision, to a Judge of the Supreme Court, who referred it to the full bench.

The cause was argued before YOUNG, C. J., and DESBARRES, MCDONALD and JAMES, J J., February 28th, 1877.

Wallace takes preliminary objection that the petition for appeal is addressed to the Chief Justice or any other Judge of the Supreme Court, instead of to the Judge of the County Court.

Bligh, in support of appeal.—The affidavits on which the writ of attachment issued here must be sufficient, as they conform to the very terms of the statute; sec. 3 of the Insolvent Act of 1875.

The defendant should have shewn with particularity in his rule *nisi* to discharge the attachment the objections to the writ and affidavit supporting it.

Wallace, contra.—The allegations in plaintiffs affidavit do not give anything more than a bald statement that defendant had called a meeting of his creditors, and had exhibited a statement showing his inability to meet his obligations, and had acknowledged his insolvency, not setting out how or when or to whom. The affidavit is clearly insufficient on these grounds. See "*Clarkes Insolvent Act, 1877*," p. 29. The act of insolvency, whether acknowledgment or otherwise, must be within three months of the attempt to put the estate in liquidation. The party must owe $500 before he can be put into insolvency; see *Clarke*, p. 47, and the section of the Act quoted on that page. It is questionable whether a writ of attachment should issue until after a demand to make an assignment has been served; see *Clarke*, p. 67.

The party here took out an attachment for his whole debt, though it is shewn he had security for part of it; *Clarke*, 280–1; *Wotherspoon*, 30.

The affidavit is not so clear and explicit that perjury could be assigned upon any part of it. Cites *Bump's Bankruptcy*, 323, 46, 49, 413, 364–5, 393, 396. The second attachment could not be issued, nor property taken under it until the goods had been re-delivered after being taken under the first writ. They could only be attached in the hands of the party. *Bump*, 403. The plaintiff could not support his application for an attachment by a supplementary affidavit, in reply to defendant's affidavits in moving to set it aside. We are not bound to set out with particularity our objections to defendant's affidavit. We say it was insufficient. Cites *Robson on Bankruptcy*, 182, 845. This Insolvent Act is *quasi* penal, and must be construed and complied with strictly.

Ervin follows.

Bligh, in reply.—The point that the party must owe $500 to be put into insolvency applies only to cases where you proceed under section 4 of the Act, by demand, a proceeding requiring no overt act of bankruptcy, but merely that the debtor is not paying his liabilities as they become due.

It is true that the act of bankruptcy must be committed within three months; but we are only obliged in our affidavit to follow the form given in the schedule to the statute, which we have done. *Robson*, cited on the other side, shews that in England the rule is the same. See also *Imperial Statutes*, 12 & 13 Vic., 1055, 1130.

The point as to the property not being re-delivered, after being taken under the first attachment, cannot affect the validity of this attachment; it could only be raised in case of an action of trover or replevin for the goods taken under the writ.

As to giving particulars of the meeting of creditors, alleged by plaintiff here, if we once begin where could we stop? Would we be compelled to state who attended, and what they did? It is the calling of the meeting, the attempt to get his creditors together, that constitutes the act of bankruptcy. The petition for the appeal is, at the worst, mere surplusage, as there was also a petition to the County Court Judge.

Wallace wishes to mention the point that the writ of attachment is directed to the Official Assignee, who is himself a creditor of defendant.

DESBARRES, J. now, (April 23rd, 1878), delivered the judgment of the Court:—

This is an appeal from an order or judgment of His Honor JUDGE JOHNSTONE, Judge of the County and Insolvent Court for the County of Halifax. The plaintiff, a merchant in this city, on an affidavit on the 31st October, 1877, stating that the defendant, a trader in this city, was indebted to him in the sum of $376.39, and had called a meeting of his creditors for the purpose of compounding with them, and had exhibited a statement shewing his inability to meet his liabilities, and had otherwise acknowledged his insolvency, applied to the said Judge and obtained from him an order for leave to

issue an attachment against the estate and effects of said defendant, addressed to the Official Assignee for the County of Halifax. This order having been granted, an attachment was issued under it, and an order *nisi* was afterwards granted by the learned Judge, on an affidavit of defendant, to set aside the said attachment and all subsequent proceedings therein, with costs, on several grounds, the main ground being that the facts and circumstances set forth in the plaintiff's affidavit were not sufficient to show that the defendant was insolvent, and that his estate was liable to be placed in liquidation. On the 21st November, 1877, an order absolute was made by the learned Judge on the petition of defendant, and the affidavits filed in this cause, setting aside the said order for the issuing of said writ of attachment, and all subsequent proceedings therein, with costs; and, on the 23rd November, 1877, an order was made by the learned Judge on the petition of the plaintiff, granting him an appeal from the said judgment, and his said order of the 21st November, to His Lordship the Chief Justice, or one of the Justices of the Supreme Court of this Province, and on that day an order *nisi* was granted by a Judge of this Court on the petition of the plaintiff, returnable before a Judge at Chambers, to set aside the judgment or decision of the learned Judge of the Insolvent Court, on the several grounds stated in the said petition. On the 28th December an order was made with the consent of the attorneys on both sides, by Mr. Justice SMITH, then presiding at Chambers, remitting the appeal in this cause to the full Court, on a special case settled in conformity with the statute; and the papers constituting the special case having been accordingly placed on the files of this Court, the case was lately argued before us on the single ground before referred to, upon which the judgment of the learned Judge of the Insolvent Court is sought to be set aside.

The case depends on the construction to be put on certain sections of the Act of 1875, to which I shall now refer.

Section 3, *a*, of this Act, declares that a debtor shall be deemed insolvent if he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement showing his inability to meet his liabilities, or if he has otherwise acknowledged his insolvency. Section

9 declares that any creditor, upon his affidavit that a trader is indebted to him in a sum provable in insolvency of not less than $200 over and above the value of any security which he holds for the same, provided the affidavit or affidavits filed disclose such facts and circumstances as will satisfy the Judge that such trader is insolvent, and that his estate has become subject to liquidation under the provisions of this Act, (form B,) shall be entitled to a writ of attachment. The question is, whether the plaintiff, by his affidavit, has satisfactorily shown that defendant actually did commit some one or other of the acts in section 3, from which it was to be presumed he was insolvent at the time the attachment was issued against his estate. The learned Judge in delivering his judgment expressed it as his opinion, and decided that the affidavit disclosed no facts to satisfy his mind that the defendant was insolvent, and that it contained nothing but bald allegations, which did not establish that fact, and that it did not show that his estate ought to be put in liquidation. Looking at the affidavit of the plaintiff, upon which the attachment was issued, I find myself unable to concur in the opinion expressed by the learned Judge, and I have, on consideration of the subject, arrived at the conclusion that the affidavit of the plaintiff was sufficient to warrant the issuing of that writ; the acts attributed to the defendant being expressly declared by section 3, *a*, to subject a trader committing them to be deemed insolvent. The Act of 1875, as I read it, does not require a creditor to state more minutely than the plaintiff has stated the facts and circumstances required to satisfy the mind of the Judge of the Insolvent Court that his debtor is insolvent. All that it requires the creditor to do, as I apprehend, is to state concisely the nature of the debt and the facts relied upon as rendering the debtor insolvent, and as subjecting him to be placed in liquidation. The plaintiff has done this in the very words of section 3, *a*, and in the form given (B); and, if he has done all that the statute requires for the purpose of putting the estate of the debtor in liquidation, he cannot reasonably be expected to do more. It appears to me that where any creditor makes an affidavit that a trader is indebted to him in a sum provable in insolvency of not less than $200, over and above the value of any security which he holds for the same, and that such

trader has committed any one or other of the acts set forth in section 3, *a*, such facts and circumstances must be considered by the Judge as *prima facie* evidence to show that such trader is insolvent, and that the creditor is entitled to a writ of attachment against his estate. If the statements of the creditor can be controverted, the debtor, under section 18, may, within five days from the service of the writ of attachment, present a petition to the Judge, praying that it may be set aside. upon the ground that his estate has not become subject to liquidation, or for any one or other of the grounds named therein. Then such petition shall be heard and determined by the Judge in a summary manner and conformably to the evidence adduced before him thereon. A petition was presented by defendant to the learned Judge, praying that the attachment might be set aside; but it was upon other and different grounds from those mentioned in section 18. The only ground relied upon was as already stated, that the affidavit upon which the attachment was issued did not show that defendant was insolvent. The plaintiff must have known whether he was or was not insolvent. If he was not he could have said so; but he did not venture to assert his solvency, preferring to rest on the objection taken that the plaintiff had not established his insolvency.

In my view the affidavit of the plaintiff states as fully as the act requires all the facts necessary to entitle the plaintiff to an attachment against the estate and effects of the defendant; and, as those facts were not controverted, I think the learned Judge of the Insolvent Court ought to have considered them sufficient to show the insolvency of the defendant, and that his estate was subject to liquidation under the provisions of the Act of 1875, and I am of opinion that the judgment of the learned judge ought, for the reasons given, to be reversed, with costs.

ATTORNEY GENERAL, ON THE RELATION OF ROSS & CO., *v.* FRASER.

FIVE licenses to search for minerals other than gold were granted to the relators, all over the same area, according to the practice adopted by the Mines office, under sections 86 and 91 of cap. 9, R. S., the first to expire 21st May, 1874, and the others at intervals of about one, two, three and four years respectively thereafter, the licenses having been all granted on or about the same date. On the 28th May, 1877, two days after the expiration of the relators' fourth license to search, defendants, having a license to search over an area overlying in part the area covered by relators' licenses to search, applied for and obtained a license to work one square mile, partially overlying and including within its boundaries the area under license to search to the relators. The latter applied for an injunction to restrain the defendant from interfering, which was refused by the Equity Court on the ground that over the area first above referred to, which contained only four and a quarter square miles, not more than four valid licenses to search could be granted, that the relators' fifth license to search, expiring May 27th, 1878, was invalid, and that on the 28th May, 1877, there was no obstacle to the defendants obtaining their license to work.

On appeal from this decision the Court held that the practice of the office was wrong in granting more than one license to search, with right of renewal, to the same party over the same area, that on this ground the license to search relied on by relators was invalid, and that without respect to defendants' title, the injunction must be refused, but without costs, as both parties had acted under an erroneous view of the law.

THIS was an appeal from the judgment of Judge RITCHIE, sitting as Judge in Equity, whose decision in which all the material facts of the case are set out, will be found in *Russell & Chesley's E. V. & D.*, 275, (*q. v.*)

Graham, for appellant, cited the following authorities; *Daniel's Ch. Pr.*, 10, 11; *L. R., 7 Exch.*, 177; *36 L. T., N. S.*, 684; *11 Grant's Ch. R.*, 281; *8 Id.*, 332; *6 Id.*, 181.

SIR WILLIAM YOUNG, C. J., now, (April 1st, 1878,) delivered the judgment of the Court:—

This is a contest between the two parties on the record for the right to work a lode or vein of copper at Polson's Lake, in the County of Antigonish, under licenses to search, of which no less than seventeen in number, for the same area or areas overlapping it, were issued between the years 1872 and 1877, by the Commissioner of Mines and Minerals, *ten* to the plaintiff's party, and *seven* to the Frazer party, or parties respectively in their interest. So strange a fact—a regular battle, it may be called, of the licenses—arrested our attention at the argument, and, of necessity, gave to it a wider scope than the original motion had evoked before His Lordship the Judge in Equity, and led to the conclusions in which all of us concur.

The case, in the eyes of both parties, is of great importance, each of them claiming the discovery of the copper and the right to a large quantity, estimated by the plaintiffs at two hundred tons, ready for shipment and awaiting the decision of this case, while the mine is valued in the bill at no less than one hundred thousand dollars, a sum that is probably much exaggerated.

Upon the bill and answer, and an affidavit of one of the plaintiffs, a rule *nisi* was granted for an injunction, which was discharged by the Judge in Equity upon a very nice question of construction; and the argument before us was upon an appeal from that decision. Taking the broader view I have intimated, let us first of all review the law as it originally stood and now stands.

We need not go back farther than the third series of the Revised Statutes, chap. 25, sec. 87, declaring that a license of exploration might cover any single tract of ground not exceeding five square miles in extent, but not less than two miles in width. By the 88th section, upon a payment of twenty dollars, the lands applied for were to be surveyed and laid off, and a full description embodied in the license, which was to be in force for one year, but might be renewed, by section 90, for a further period of twelve months. By the 92nd section, the holder might, at any time before the expiration thereof, select an area of one square mile out of the five, and obtain a license to work.

In 1869, by chap. 1, sec. 93, this system was largely modified and the present mode introduced, which has led to so many rivalries and not a few scandals, but has now come for the first time formally before the Court for adjudication, though another very important branch of the Act, (secs. 75 to 78, and 104, chap. 25, Revised Statutes, 3rd series), came before me at Chambers and was determined in 1869.

Section 93, to which I have just referred, is identical with sec. 91 of the Revised Statutes now in force, which section, in the case of mines other than gold mines, provides that when a license to search has been granted, the Commissioner of Mines, may grant other licenses to search over the same area, *provided that he shall grant no more licenses than there are areas of one square mile each contained within the area so*

first licensed, and after the first licensee has chosen his square mile the others shall select theirs in the order of their licenses, provided that the right of search of the second licensee and his license shall commence immediately after the expiration of the license or renewed license of the first licensee, or on the selection of his square mile by the first licensee, and so on till each in order has selected his square mile and the whole area is disposed of.

The 93rd section enacts that a holder of a license to search may, at any time before the expiration thereof, select from the land covered by such license an area of one square mile, for the purpose of working the mines and minerals therein, and make an application in writing to the Commissioner of Mines to work the same, which shall be accompanied by a payment of fifty dollars; and the 94th section provides that on such application and payment the Commissioner of Mines shall cause the portion so selected to be surveyed and laid off, &c., &c.

The 96th section enacts that upon complying with the requirements of the chapter, the applicant shall be entitled to a license to occupy and work the one square mile applied for.

The previous sections, 86 to 90, are in substance the same with those I have already cited from the act in the third series, extending the length of the five square miles in the license of exploration, now called the license to search, to two and a half miles.

Taking these sections together, the main inquiry now is, what is the object and the true construction of sec. 91? A license to search is granted within the five square miles described therein. What are the rights of the licensee? First of all, an exclusive right of search for one year; secondly, the right to a license to work over one square mile out of the five, making no provision for fractional parts, to be selected within the year; thirdly, under section 90, a permissive right under special circumstances, that is, on sufficient cause shewn, to a renewal of his right of search for a further period of twelve months. Subject to these rights, the Commissioner may grant other licenses to search for minerals over the same area, and after the first licensee has exhausted his rights by expiration of time or selection of his one square mile, the right of search of the second licensee and his license shall

commence, and the third license shall commence at the end of the right of search of the second, or his selection of his square mile, as aforesaid, and so on till the whole area is disposed of.

Here is an intelligible system, preventing confusion and monopoly, giving the rights specified to the successive licensees, to whom actual licenses ought to be issued, each paying his twenty dollars, and exercising in turn his exclusive rights of search and selection, each for his own year, or an extended period of twelve months more, independent of any other. But the practice of the office, as appears from the case before us, has been altogether different. and the evils against which the Legislature had so carefully guarded the public domain have been fostered and aggravated, and have enabled a few shrewd and successful speculators to profit at the expense of the many. The Court is far from attributing these unhappy consequences to any sordid purpose or sinister design of the officers of the government, but it is clear that they have entirely misapprehended and defeated the course and objects of the act.

Let us look at the illustration afforded by the case in hand. I examined a sketch used at the argument and supported by the pleadings, shewing that both parties were equally at fault, and distinguishing what is called the Ross from the Simpson area, each of them comprehending or overlapping the coveted area. In the Ross area, the first license to search issued to the late Alexander P. Ross, dated 20th May, 1872, and expired 20th May, 1873. Mr. Ross having died, the second issued to Howard Primrose and Sarah Ross, his executors, 16th April, 1873, and expired 21st May, 1874, being the origin or first step, as the defendants contend, of the plaintiff's title. Then comes a strange phenomenon, for on the 25th July, 1873, while the second license was in full force, the officer issued, or agreed to issue, (for it does not appear that any actual licenses were taken out,) no less than four licenses, all of the same area, to the present plaintiffs, or relators, Sarah Ross, William H. Ross, and Smith McKay, expiring respectively and in succession, on the 22nd May, 1875, nearly two years after the date, the 23rd May, 1876, the 26th May, 1877, and the 27th May, 1878, on which last the defendant's counsel rely as defeating the plaintiff's title. Then come four

other prospective licenses, as we may call them, all licenses to search, for the plaintiffs never got, though they applied for, and contend they are entitled to, a license to work,—these four licenses expiring in the month of May, 1879, '80, '81 and '82. A more finished picture could not well be drawn.

Let us see now how the defendants stand. Their first license, to Simpson and Flockhurst, or rather the first license to the area the defendants claim, was granted 20th September, 1872, expiring 21st September, 1873. While this was in full force, with the exclusive rights of search, and renewal in the first licensees, on the 11th and 12th of August, and the 3rd September, 1873, four other licenses issued to Fraser, expiring in the month of September, respectively, in the years 1874, 75, '76 and '77; and, not content with this ample provision, the licensees obtained other two licenses, expiring in September, 1878 and 79. And, on the fifth of these seven licenses expiring, 25th September, 1877, the defendants having obtained licenses to work 31st May, 1875 and 28th May, 1877, rely, on the ground that plaintiff's fifth license expiring 27th May, 1878, had ceased to operate, the plaintiff's fourth license having expired 26th May, 1877, just two days before the defendant's last license to work, so dexterously and so narrowly was the time watched.

But what is a Court to say to all this manœuvring in the the very teeth of the statute? It obliges us to hold these successive licenses illegal, and this view, as it operates against the title of the plaintiffs, may affect also that of the defendants and their licenses to work.

What then is to be done? The government has received payment for, and granted these numerous licenses, and is bound to protect the party equitably entitled. Each of them claims to have been the discoverers of the copper, and to have made large expenditures. The copper that has been dug waits for an owner. The Attorney General we look upon as a mere nominal party, combined with the plaintiffs in this suit to protect their rights, we do not say improperly, but not to protect the rights, nor claiming any forfeiture on the part of the crown. What the justice of the case requires is that the claims of both parties should be examined on the spot by a competent and impartial person and, upon his report, that one

or more licenses to work or leases should be granted to the parties fairly entitled, upon such terms as the statute and the sound discretion of the Government shall present. The nice question of the fractional part of a mile will not in that case arise, and substantial right will be done. Neither party, we think, should have costs.

RITCHIE, E. J.—I concur in the view taken by His Lordship the Chief Justice, that the relators, for the reason he has given, have failed to shew that they had a valid right of search over the area claimed by them, and are, therefore, not entitled to the injunction they have applied for; nor can it be obtained by the Attorney General independently of them. The only ground on which he seeks relief is that they had a valid right of search over the area claimed by them, and that, on that account, the defendants' license to work had been improvidently granted, for the Attorney General, like any other party, is confined to the allegations in his writ. I also concur in thinking that the rule *nisi* should be discharged without costs, as both parties have acted under an erroneous view of the law, though in accordance with the practice pursued at the office of the Commissioner of Mines.

Assuming that neither party has acquired a valid right to the mine in question, the course suggested by the learned Chief Justice, if practicable, seems the one best calculated to do substantial justice. This being merely an application for an interlocutory injunction which fails from the defect of the plaintiffs' title independently of the defendants', whether good or bad, I prefer, at present, expressing no opinion as to its validity or invalidity.

IN RE ESTATE OF JOHN SIMPSON.

THE real estate of the intestate was partitioned by commissioners appointed under the Probate Act, who, by their report, left a certain portion of the land undivided. This partition was confirmed by order of the Court, the estate having been previously settled by decree of the Judge of Probate, which was in evidence. Afterwards, W. Hawkins, husband of one of the heirs of intestate, petitioned the Judge of Probate for a partition of the undivided portion; and a large body of evidence of possession was put in on both sides, the whole of which this Court held to be futile and unnecessary, as there was no ground for sustaining any possession in either party that could influence the decision. The Judge of Probate dismissed the petition on the ground that he had no power to settle disputed questions of title. On appeal to the Judge in Equity this decision was overruled, and the Judge of Probate directed to proceed with the cause, which he did, and dismissed the petition on the merits, dividing the costs between the litigants.

Both parties having appealed, *Held*, that the final decree above referred to was evidence, with the other evidence before the Court, of the final settlement of the estate by the Judge of Probate; that after such settlement his jurisdiction over any unsold or undivided portions ceased; that the objection for want of jurisdiction was rightly taken at any stage, and that the appeal of the petitioner Hawkins must therefore be dismissed.

The costs of both appeals were given to the successful party before the Judge of Probate, except the costs of the evidence above referred to, relating to title by possession.

JAMES, J., (April 1st, 1878), delivered the judgment of the Court:—

THIS was an application by W. Hawkins, husband of one of the heirs of John Simpson, of Newport, Hants County, to the Judge of Probate for that County, for the partition of the residue of his real estate, under chap. 90, sec. 40, of the Revised Statutes.

It appears by the evidence taken by the Judge of Probate that John Simpson died in the year 1859, intestate; that in the year 1863 a partition of the real estate of the deceased, under the section above referred to, was completed in due form of law by Commissioners appointed under the act. At the end of the Commissioner's report allotting to the several heirs their respective portions, and included in the report, appears the following clause:—

"There is also a piece of land claimed by the heirs, adjoining a marsh lot deeded by the late John Simpson to his son John Simpson, but they were not prepared to point out the bounds of their claim, which is still undivided. The above shares are numbered, described and bounded in the annexed plan."

This partition was confirmed by order of the Court on the fourth day of December, 1863. Previously to this partition the Administrator's accounts were passed, and the estate finally settled by decree of the Judge of Probate, which is before us

dated in 1860. No steps have since been taken to divide the two acres referred to as remaining undivided in the Commissioner's report.

The present proceeding was commenced by petition to the Judge of Probate, dated November, 1873, for the partition of the two acres remaining undivided. The citation thereon was addressed to the next of kin and heirs generally without naming them individually; and there is an affidavit of service upon John Simpson, one of the heirs, but no evidence of service upon the other heirs. This is one of the objections urged by appellants. It is a serious objection, but does not call for any decision at present.

The application was opposed by John Simpson, who claimed to be sole owner of the disputed premises under a deed to him from his father, the intestate, dated December, 1846. The validity of this deed was disputed by some or all of the other heirs on the ground of fraud, of possessory title in the intestate, and the heirs, as against John Simpson, Junior, the appellee, and because the premises were not included in the deed to the appellee. It is needless to say more respecting these three grounds of contention than that there appears to be no sufficient ground in the evidence for the charge of fraud; that a vast body of evidence of possession was put in by both sides, the whole of which is futile and unnecessary, as there is not even a plausible ground in the evidence for sustaining any possession in either party which could have any influence upon the decision of the cause.

As for the question of title depending on the boundaries in the deed, the evidence is, perhaps necessarily, meagre, and, with the insufficient evidence before us, it is exceedingly difficult to determine. In this judgment, however, it will not be necessary to come to any decision upon it. Of one thing, however, we are quite assured, viz.:—that the costs of these proceedings have been unnecessarily inflated, and will far exceed the value of the two acres of barren land, in respect of which they have been incurred.

Upon the hearing of counsel for Hawkins and John Simpson, respectively, the Judge of Probate dismissed the petition, on the ground that he had no right or power to settle the disputed questions of title between the parties. From this

decision there was an appeal to the Hon. the Judge in Equity, who reversed the decision of the Judge of Probate, and, by rule of Court dated 22nd November, 1876, remitted the cause to him to take evidence and decide upon the question of title. This decision this Court has no reason to impugn, nor have we any doubt that the learned Judge was right in his judgment on the case as it was presented to him; for it was admitted on the argument that his attention was directed solely to the right and power of the Judge of Probate to decide questions of title in cases of partition when properly before him in the course of the settlement of an estate; and not at all to the point on which this case is decided.

In obedience to the rule of the Court to which I have referred, the learned Judge of Probate proceeded to take the voluminous evidence before us, and thereon decided the question of title in favor of the appellee, John Simpson, and dismissed the petition, dividing the costs between the litigants instead of giving them to the successful party. From this decree the petitioner appealed on the merits, and John Simpson, the successful party, on the merits, appealed on the ground of having been refused his costs, to which he claimed to have a statutable right.

At the argument it was objected against the petitioner, among other things, that the Probate Court had no jurisdiction, inasmuch as the estate had been closed by final decree of the Judge of Probate many years before the petition was filed, and upon this question the counsel for John Simpson was stopped on the argument, and Mr. Ritchie for the petitioner called upon, who argued, first, that the respondent, John Simpson, had accepted the jurisdiction of the Court, and waived the objection by not taking it at an early stage of the proceedings; and, secondly, that this was not a new proceeding, but must be held to be a continuation of the original proceeding to divide the estate, as there was no legal evidence that the estate had been settled in the interim between the first and second proceedings. No authorities were cited at the argument on either side tending to aid the Court in coming to a conclusion upon these questions. Indeed, there was scarcely any argument upon the main question whether the Court of Probate has concurrent jurisdiction with the superior Courts in the partition of real estate.

The original jurisdiction of the Ecclesiastical Court extended as to real estate no further than to the making probate of wills of real and personal estate, but if the will were of lands alone, an Ecclesiastical Court had not even this jurisdiction, but the will was provable only in the Court of Chancery.

The executor or administrator had no power at common law to interfere with the real estate further than that authorized by the terms of the will itself, the heir being the only party interested in it. But the tendency of the law, more especially in the colonies, has been and still is in the direction of gradually breaking down the distinctions between real and personal estate; and this object, which still remains as the battle ground of the two great parties of the state in England, has been nearly accomplished by the legislation, if not more enlightened, at least more suited to our own circumstances, on this side of the Atlantic. In this spirit great powers have been given by statute to the Probate Courts, and they are not only authorized to partition the land among the heirs, but to order it to be leased, mortgaged or sold for the payment of debts. Indeed, for the purpose of settling estates, they are expressly invested with all the extensive powers of the principal courts of Equity, including, as has been already held by the Judge in Equity in this case, the power of trying in their little offices in the county towns, without a jury, the title to real estate. The conferring of these extensive powers has arisen from the necessity of the case, as the great majority of the estates to be settled are small, and could not afford the expense of having every question respecting them adjudicated upon in the superior courts. But it is only so far as these powers are necessary to be exercised in the balancing, arranging and settling of the various and often complicated questions arising between the claimants on estates, that they were called into operation or are suffered to exist. It never was the intention of the statutes which have been passed from time to time conferring these extensive powers, that they should be exercised except as subsidiary to the main object for which the acts were passed, namely, the creation of a convenient court in every county for the settlement in a cheap and summary manner of all questions arising in the settlement of estates of deceased persons.

The legislation in this Province commenced in the first year (1790) in which we had a Legislature. The Act 32 Geo. 2, c. 11, (1 P. L., 12,) was entitled "An Act respecting wills, legacies and executors, and the settlement of the estates of deceased persons." It was founded, as it appears by a note of the editor, on the laws of the other colonies, and especially of the colony of Massachusetts Bay; and it contains provisions for the partition of land substantially as they now stand in the Revised Statutes. In all this time it has never been held or contended that the large powers thus conferred on the Probate Court were to be exercised, except to the extent and for the purpose indicated by the title of the original act. The estate having been settled in 1860, and the administrators discharged, there was no longer any necessity that the jurisdiction of the Judge of Probate should be invoked for the partition of this residue. It cannot, under the circumstances, reasonably be contended that this was a continuation of the former proceedings, as, with the final decree for the settlement of the estate, the power and jurisdiction of the Judge of Probate over any unsold and undivided portion of the real estate of the intestate had ceased. We consider this objection rightly taken at any stage of the proceedings. The matter was *coram non judice*, and an objection to the jurisdiction is always in time. No Court can be clothed with jurisdiction not rightly belonging to it by the consent of parties, nor by any waiver, which can be but temporary, of the right to object to the jurisdiction. We are also of opinion that the original decree of the Court, which we have before us on the files of the Court, and which is referred to throughout the proceedings, is sufficient evidence, with the other evidence before us, of the final settlement of the estate.

The appeal of the petitioner Hawkins against the decree upon the merits must therefore be dismissed with costs.

The appeal by the respondent, John Simpson, against the decision of the learned Judge of Probate refusing him costs, must be sustained upon the wording of the statute, R. S., ch. 90, s. 62, which expressly enacts that the costs shall be paid by the party against whom the decision may be made in any matter contested before the Court. The Judge's power was limited by the statute, and he had no right to partition the

costs, as he has done, between the parties. But this Court has the power under the same section to give the costs as shall seem to us just and proper; and under this clause we give costs to the respondent, John Simpson, up to the time of the first hearing before the Judge of Probate, and we withhold them from him on the further proceedings, because the objection to the jurisdiction of the Court on which this cause has now been decided was not taken at the outset as it ought to have been. Had it been then taken it would have been disposed of, either by the Judge of Probate or the Judge in Equity on appeal. The respondent, Simpson, by this omission, is responsible, by his neglect, for all the large amount of costs since incurred, and cannot be allowed costs, arising from his own default.

DESBARRES, MCDONALD, and SMITH, J J., concurred except as to costs, and the rule ultimately passed, giving John Simpson costs on both appeals, except costs of evidence relating to title by possession.

TROOP *v.* TROOP.

PLAINTIFF, J. H. Troop, along with C. J. Troop, made a note to defendant for a debt due to defendant by C. J. Troop. The jury found that there were stamps on the note when signed. It appeared that the stamps afterwards became detached, and defendant said; "I affixed the stamps to the note when it was brought back to me by C. J. Troop, and obliterated the stamps." This was not done in plaintiff's presence, nor by his direction, nor by the direction of C. J. Troop.

Held, that, although the assent of C. J. Troop might be applied, he could not be accounted the agent of his surety for obliterating the stamps, and that neither his direction nor his assent would have satisfied the statute 31 Vic., c. 9, 1867.

THIS cause was tried at Annapolis, and a verdict found for the defendant which came before the Court on a rule to set the verdict aside, the sole question for the Court being as to the validity, under the Stamp Acts, of a note made by the plaintiff with others to the defendant, and pleaded as a set-off by defendant.

SIR WILLIAM YOUNG, C. J., December 20th, 1873, delivered the judgment of the Court, making absolute a rule for a new trial:—

The sole question here is the validity of a note of the plaintiffs pleaded by the defendant as a set off, and which, if

good under the Stamp Act, 31 Vic., ch. 9, is an answer to the plaintiff's action. It was signed by the plaintiff, Jacob H. Troop, along with C. J. Troop, to the defendant, William H. Troop, as a security for $152.30, due by Charles to William. The plaintiff and defendant were the only witnesses at the trial as to the making and stamping of the note, and they differ somewhat in their account of the transaction; but, as the jury found for the defendant, establishing the note, we must see whether his statements bring the note within the operation of the 4th and 10th sections of the Act. Under the 10th section the proper stamp or stamps, in the case of a promissory note, shall be affixed by the maker,—that is, as I read it, by the maker himself, or by some one in his presence, and with his assent, or by his direction to be established in proof. The obliteration also, in the modes pointed out by the 4th section must, as I think, be done by the maker, or by some one in his presence, and with his assent, or by his direction, to be established in proof. Where there are several makers the same requisites are required of each maker.

These strict and somewhat complicated provisions, as pointed out in the Canadian decisions cited at the argument, will sometimes work injustice and prevent the recovery of an honest debt; but it is our duty, notwithstanding, to give effect to the law. The defendant says; "When the plaintiff signed the note, I saw Charles J. Troop, the other maker, sign it. I put the stamps on the note when it was made, in the presence of Charles. The stamps were on the note when it was signed." This is expressly contradicted by the plaintiff, who says there were no stamps on the note when he signed it, but it was credited by the jury, and satisfies the requirements of the 10th section. The defendant then says that Charles brought back the note to him after it was signed by the plaintiff. When Charles brought it back, the stamps were not on it, but folded up in the note. How they got loose, if previously affixed, is not explained. The defendant adds; "I affixed the stamps again on the note when it was brought back to me by Troop, and obliterated the stamps." The obliteration, therefore, was not done by the plaintiff, nor in his presence, nor by his direction, nor even by the direction of Charles, his co-maker, though his assent may be implied. He was the principal debtor,

and the plaintiff his surety, and I think that he cannot be accounted the agent of the surety for this purpose, and that neither his direction nor his assent would have satisfied the statute. This was the opinion of the Judge who tried the cause, and concurring in it, I think there ought to be a new trial.

The cause was again tried at Annapolis under the same state of facts, except that further stamps had been affixed to the note after the argument of the rule to set aside the first verdict and before the second trial. On the second trial the jury found a special verdict, leaving the question as to the validity of the note to be determined by the Court.

SMITH, J., on the first day of the present term, delivered the judgment of the Court:—

The sole question for the consideration of the Court in this case is the validity of a promissory note of the plaintiff, and pleaded by the defendant as a set off to an action on a bond. The plaintiff's case was clearly established, and under the direction of the learned Judge who tried the cause, a special verdict was given, as follows:—"We find the amount of the defendant's set off, to which he is entitled in this action, independent of the large note of $152.30, to be $25. And if the Court shall be of opinion that the large note is legal and well stamped, then it is to be added to the above amount, and final judgment to be entered up accordingly; if not, judgment to be entered up for plaintiff for the amount of his claim under the bond, less the amount of set off proved and found to be due."

It is contended on behalf of the plaintiff that the note in question is insufficiently stamped under the Stamp Act, 31 Vic., ch. 9. It will be unnecessary for me to enter upon a consideration of the facts of this case. This action has been twice tried under the same state of facts, with the exception that since the argument on the rule to set aside the first verdict, and before the second trial, further stamps were affixed to the note. If the note was originally insufficiently stamped this will not assist the defendant or remedy the defect.

A decision of this Court, after solemn argument, has been given, with the same evidence before them, setting aside a

verdict for the defendant on the first trial, and establishing the invalidity of the note under the Stamp Act.

Although not constrained to accept the decision of this Court as binding or conclusive upon my judgment, yet, where an appellate jurisdiction exists by which such a decision can reviewed, and, if inaccurate, reversed, I should require to bring my mind to the clearest possible conviction of the error of my learned brethren before I should pronounce an opinion in contravention of their judgment.

I have not been able to bring my mind thus clearly to regard the decision of this Court as erroneous. It is true there is to be found in the case of *House* v. *House*, 24 U. C. C. P., page 526, a *dictum* of the learned Judge who delivered judgment at variance with the judgment of this Court, but there are also to be found decisions contra; and after a careful consideration of the Stamp Acts, however severe the construction of them may be, I cannot but conclude that the decision of my learned brethren in this case, was a sound exposition of the law, and that the note in question was insufficiently stamped to satisfy the statute.

The judgment must be for the plaintiff in the terms of the special verdict, and the rule *nisi*, made absolute with costs.

IN RE CITY OF HALIFAX AND SEETON ET AL.

PARTIES proceeded against under the provisions of section 655 of the City Laws for infringement of the regulations relating to buildings are entitled to an information as in the case of *City of Halifax* v. *McLearn*, 1 Oldright, 689, if they require it, when, if the Court declares the tructure to be a nuisance, the Council may order its removal, and it is not necessary to resort in the first instance to the Police Court, under section 654. *(See* note at the end of the case).

IN this case an order *nisi* was obtained from JAMES, J., for the demolition of a building, on the ground that it had not been constructed in accordance with the provisions in the City Charter relating to buildings. The Judge referred it to the full Court, and the matter came up for argument this term.

Sutherland, Q. C., for the City.—We proceed under sec. 654 of the City Charter, and sections 662 and 655. The law is a most important one to the city. If this building, is

declared to be a public nuisance, then we claim for the penalties.

Thompson, contra, after referring to the policy of the law, and contending that it had been complied with substantially, and that a compliance with its strict letter would have resulted in a more dangerous structure than the existing one, proceeded to argue the legal questions involved in the case.

This is not the mode of proceeding. This is not a proceeding for the penalty, but simply to have the building declared a nuisance. I submit that in that view Mr. Brookfield, who was only the contractor, should not be a defendant, as he is only liable, if at all, for the penalties. The penalties follow not from its being a nuisance, but because it is a violation of the act. There are two proceedings, one declaring it a nuisance, and the other for penalties. (YOUNG, C. J.—After it is declared a nuisance, is not Brookfield liable for the penalty?) No, the penalty does not follow from its being declared a nuisance. The proceeding for penalties may or may not be taken after it is declared a nuisance.

Sec. 655 is the only one under which this proceeding can be taken. The previous clause having declared such buildings to be nuisances, the proceeding should be by indictment or information.

YOUNG, C. J.—If you require an information we will order it to be filed.

Meagher.—We have had an information here. It was treated as a complaint in the reported case of the *City of Halifax* v. *McLearn*, 1 Oldright, 689.

Thompson.—It cannot be contended that we have had an investigation here, because in the Court below, I contended that the proceedings were irregular.

SIR WILLIAM YOUNG, C. J.—The parties proceeded against in this cause are entitled to an information, as in the case of the *City of Halifax* v. *McLearn*, 1 Oldright, 689, if they require it, and if the Court then declares the building to be a nuisance, the City Council *may* order it to be removed.

McCoy.—I wish it to be understood that I will in the *City of Halifax* v. *Sheehan* except to the information, and urge that

the matter should go to the Police Court first as provided by section 645. I wish a decision of the Court upon that point.

SIR WILLIAM YOUNG, C. J.—We decide that clause 655 is a distinct and independent clause, and that it is not necessary to go to the Police Court.

(NOTE.—The proceedings were ordered to be amended by filing an information as against Seeton,—omitting Brookfield, the Contractor. Costs as to Brookfield reserved.)

IN RE BUNKER'S ISLAND.

PROTHONOTARY ordered on motion to account for bank interest on money paid to him under 37 Vic., c. 13, s. 2, for land appropriated to Dominion purposes under the Act; but allowed ten per cent. on the bank interest as compensation.

THE question decided by the Court in this cause arose out of the appropriation by the Minister of Public Works of certain lands in Yarmouth County for public purposes under the provisions of 31 Vic., c. 12, and 37 Vic., c. 13, for which land a large sum of money was paid to the Prothonotary of this Court. It was referred to a Master to ascertain who was entitled to the money so paid into Court, and his report was, by consent of the parties interested, referred for confirmation or otherwise, to SIR WILLIAM YOUNG, C. J., whose decision was as follows:—

This property was conveyed by E. E. Archibald to the Queen, at the instance of the Minister for Public Works, on the 29th December, 1874, for an agreed price of $6,000, out of which the amount due upon a mortgage held by Thomas O. Geddes, was to be paid. On enquiry as to the title it was found to be complicated, but a long uninterrupted possession in the Kellys, under whom Geddes and Archibald claimed, had extinguished all prior claims, except J. C. Moulton's to one lot at the northern extremity of the Island, founded on a deed of 1854, and conveyed in September, 1875, to H. A. Parr. The Minister of Works thereupon, under the Dominion Act, 37 Vic., chap. 13, secs. 1, 2 and 4, in March, 1875, paid into this Court the consideration money of $6,000, with $180 for six months' interest thereon, by rule of 7th August, 1875. It

was referred to Alex. James, Esq., as a Master, now one of the Judges of this Court, to enquire into the whole matter. A great mass of evidence was thereupon taken, and numerous documents produced; and on the 3rd February, 1876, the Master made an elaborate report, which is now before me, under the annexed consent signed by counsel, who have severally attended before me and exhibited their views. The main enquiries have been substantially settled. The amount due on Geddes' mortgage on the 16th Sept., 1875, was agreed at $4,076.78, leaving out of the $6,180 paid in, $2,103.22, which has been paid to Archibald, and of the sum due on the mortgage, $3,458.78 has been paid to Geddes, leaving $625 in Court to meet Parr's demand, if established, and costs.

It would be a waste of time to travel over the evidence, all of which I have read, and I am of opinion that there is no shadow of title either in Moulton or in Parr.

The parties who conveyed to Moulton for a nominal consideration of £5, were neither grantees nor shewn to be their descendants, and Parr was buying, not land which, under the statute, was in the Crown, but a disputed claim to $187, for which he paid, or is assumed to have paid, $150 out of the consideration money.

It is true that the enquiry before the Master extended far beyond the disputed area, and was indispensable in proof of the general title, the costs of which must fall upon the vendor. There is no pretence for throwing these costs upon the Crown, and only a moderate share of them attaches to Parr.

The Master reports that $106.50 additional interest should be paid by the Government to Archibald, as the proceedings have, without fault of the claimants, extended beyond six months from the 13th April, 1875, the date of the notice.

Now, the ground of such a demand, under the 4th section of the Act, is "any error, fault or neglect of the Minister," and I am not clear that the interval between the conveyance and taking possession of the Island and paying in the money can be accounted an error, fault or neglect.

But, under all the circumstances, I presume that the Government will not object to the payment of this small amount to lighten, in fact, Mr. Archibald's costs. I therefore confirm this allowance, as also the payment of $20 for Archibald's

expenses. I do not allow the Government costs as against any of the parties. Assuming that these two sums will be paid in, the amount in Court will be $551.52, out of which $125, retained by the Master as his fees, are to be paid, leaving $626.52 to be paid to Geddes.

In strict justice a large share, perhaps, of the costs ought to fall on Parr, but I content myself with deciding that he shall pay to Archibald forty-five dollars, being about one-third of the Master's fees, which will close the transaction.

An application was then made to the Court, based upon the following affidavit :—

I, Charles Sydney Harrington, of the City and County of Halifax, Esquire, do make oath and say as follows :—

1st. I say that under and by virtue of an Act of the Parliament of Canada, passed in the year 1874, the Minister of Public Works of the Dominion of Canada appropriated to the uses of this Dominion certain lands in the County of Yarmouth, known as Bunker's Island ; that, by virtue of the authority vested in him by said Act, he did, on the thirteenth day of April, A. D. 1875, pay into the hands of Martin I. Wilkins, Esq., Prothonotary of this honorable Court, the sum of six thousand one hundred and eighty dollars as compensation money and interest, to be thereafter appropriated according to law among the several owners of the said Island, and an order or notice, in compliance with section 2 of said Act, was then published, calling upon all parties interested to appear and prove their title to the money aforesaid.

2nd. I say that proceedings were thereupon taken by Ebenezer E. Archibald, the owner of the land, and Thomas O. Geddes, a mortgagee, to procure payment out of the fund in Court, but no money was actually paid out of said fund by said Prothonotary until on or about the twenty-seventh day of March, A. D. 1876, on which date the sum of five thousand five hundred and fifty-five dollars was paid as follows :—

For Thos. O. Geddes.....	$3,451.78
For E. E. Archibald.....	2,103.22
	$5,555.00

the above being the amount due said Archibald for his fee simple, and the undisputed amount due said Geddes upon his mortgage.

That from the date last above mentioned until on or about the 22nd day of August, A.D. 1877, the balance of six hundred and twenty dollars remained in the hands of the said Martin I. Wilkins, and on that date the further sum of four hundred and ninety dollars was paid to said Thomas O. Geddes by order of His Lordship the Chief Justice, a copy of which is hereunto annexed, marked A. I crave leave to refer to the original papers on file herein, from which the facts above set out more fully appear.

3rd. Lastly, I say that I am informed and verily believe that the said sum of $6,180 was placed in the bank upon deposit receipt by the Prothonotary aforesaid, and I pray an order of this Honorable Court for the payment due to Thomas O. Geddes of the interest of the proportion of the moneys aforesaid belonging to him.

(Signed) C. S. HARRINGTON.

The following is the exhibit referred to in the affidavit:—

On reading the agreement of 15th day of May last by counsel, and on argument of the rule *nisi* to confirm the report of the master herein, and on motion, it is ordered that the Minister of Public Works for the Dominion of Canada do forthwith pay to the Prothonotary of this Honorable Court at Halifax the sum of one hundred and six dollars and fifty-two cents, as interest on the purchase money of the above Island, over and above the sum already paid in as interest, and also the sum of twenty dollars for expenses of E. E. Archibald attending in Halifax under the circumstances in the report mentioned to prove his title. And it is further ordered that Henry A. Parr, of Yarmouth, in the County of Yarmouth, do pay to E. E. Archibald, the sum of forty-five dollars as costs of opposing the claim of said Parr to one acre of the above-named Island, and that said Archibald do have execution therefor after the service upon him of this order and the lapse of thirty days thereafter. And it is further ordered that the Prothonotary at Halifax do, on this order being presented to him pay to Mr. Justice James $125 for his fees as master, and when the above-named sums shall have been paid in by the Minister

of Public Works, that the said Prothonotary do pay to the order of E. E. Archibald $20, and the balance of the money then in his hands to Thomas O. Geddes, deducting therefrom his fees as Prothonotary on this enquiry, and the sum of $490 which he is to pay forthwith to the order of said T. O. Geddes.

(Signed) W. YOUNG.

Upon reading this affidavit the following rule was granted:

That Martin I. Wilkins, the Prothonotary at Halifax, do pay to Thomas O. Geddes, or his Attorney, interest upon the money of said Thomas O. Geddes paid into the hands of said Martin I. Wilkins as Prothonotary aforesaid in the above matter, at the rate of four per centum per annum, or whatever other rate of interest the said Prothonotary may have received upon the said money from the time said money was paid into his hands until the time at which the same was paid out to Thomas O. Geddes, aforesaid, deducting from said interest whatever allowance, if any, the Court shall award said Martin I. Wilkins, (as a commission for receiving and paying out the same,) from money of said Geddes; unless cause to the contrary be shewn before this Honorable Court, on Friday, 29th day of March, A. D. 1878, at eleven o'clock in the forenoon.

(Signed) M. I. WILKINS, *Proth'y.*

The Prothonotary showing cause against the rule produced the following affidavit:—

I, Martin I. Wilkins, of Halifax, in the County of Halifax, Prothonotary, make oath and say:—

1st. On the 23rd of March, 1876, six thousand one hundred and eighty dollars was deposited with me under a statute of Canada by the Government of Canada, subject to the order of this Honorable Court, to pay the value of certain lands at Bunker's Island, and I paid out the said sum under the order of the Court, as follows:—

To E. E. Archibald	$2,103 22
" T. O. Geddes, at one time	3,451 78
" " at another time	490 00
" A. James, Esq., Master	125 00
In all	$6,170 00
Bal. subject to order	10 00
	$6,180 00

2nd. The deposit, as I gather from the papers on file, included the price of the land and interest, and it also appears that further interest was ordered to be paid, so that the parties must have been paid the price of their land and the interest thereon, and therefore I presume it is that Mr. Geddes and his Attorney have not alleged that he has not received the full amount of his claim.

3rd. I do not receive money deposited on any condition, express or implied, that I am to pay interest for the use of the same, as it is not paid to me for any benefit or advantage, but for the convenience of the depositor, and my duty requires me to keep and pay it to those who are legally entitled to take it out of Court. I am neither bound to pay interest on money deposited with me, nor am I bound to invest it at interest for the depositor.

4th. A statute of the Province deprives the Prothonotary of any kind of compensation for the trouble and risk of keeping and paying out money in two cases, which is manifestly unjust, as no man ought to be compelled to disburse and incur the risk of keeping money for other persons without compensation.

The enactment, however, expressly depriving the officer of compensation in two cases, by necessary implication, authorizes him to insist on compensation in all other than the excepted cases.

5th. My commission on the money so deposited, by the Canadian Government is still open for arrangement, as I have paid out all the money deposited, with the exception of ten dollars.

6th. Money so deposited is not paid to me at my request, nor am I a votuntary bailee or depositary in respect of it, but I am compelled to accept and take the risk of keeping it until it is called for, and know of no principle, legal or equitable, on which I can be called upon either to pay interest, invest at interest, or account for interest on money so forced upon me.

7th. Mr. Geddes has no legal claim on me that I am aware of for any money received by me to his use, and if he supposes that he has such claim the courts of justice are open to him and he can there enforce his rights.

8th. I do not think that Mr. Geddes or any other person can legally call on me to state how I deal with money deposited with me. My duty requires me to keep it and pay it out to those who are legally entitled to demand it. I have so kept and disposed of the money in question, and Mr. Geddes has no right to enquire how I employed or whether I employed the money, or simply kept it locked up in my money-box, which are entirely at my own discretion.

9th. I do not believe that Mr. Geddes has a claim for any amount from any person in respect of his land, and I consider this motion a mere speculation to try and obtain money to which he has no just or legal claim.

(Signed) M. I. WILKINS.

The motion was argued during the present term.

SIR WILLIAM YOUNG, C. J., (April 1st, 1878,) delivered the judgment of the Court:—

The circumstances upon which $6,180 was paid by the Minister of Public Works into Court appears in the Chief Justice's judgment of 10th August, 1877, (*ante p.* 367,) in which all parties acquiesced.

This payment is admitted by the counsel for the Prothonotary to have been made 25th April, 1875, in place of the 29th March, 1876, as stated by mistake in his affidavit, marked C. Mr. Harrington states in his affidavit, marked B, that the amount was placed in the bank upon deposit receipt. In April, 1875, the Bank of Nova Scotia issued deposit receipts at 5 per cent., payable on receiving 30 days' notice, and at 4 per cent. upon receiving 15 days' notice. The usage of the banks has been to pay such deposits with interest on demand, deducting 15 or 30 days' interest, as it may be.

The Prothonotary did not apply for or obtain a Judge's order to deposit this large sum, nor did he require it, for it was his duty to do so, both for security and to put it at interest. He has not stated in his affidavit, while not denying the fact of the deposit, whether it was at 4 or 5 per cent.

The question before us is to whom does the interest received rightly belong?

The accounts as rendered to us at the argument, and which seem to be correct, stand thus :—

Amount paid in		$6,180 00
Paid out 23rd March, 1876 :—		
Archibald	$2,103 22	
Geddes	3,451 78	
Under a Judge's Order :—		
Geddes, Aug., 1877	490 00	
Master's Fees	125 00	
In all		$6,170 00
Leaving		$ 10 00
Archibald was the owner of the Island, and Geddes held a mortgage on which there was due 16th Sept., 1875		$4,076 78
He received as above the sums of $3,451.78, and $490,		3,941 78
		$ 135 00
He is entitled besides to interest from 16th Sepember, 1875, to 22nd March, 1876, on $4,076.78		125 28
Making		$ 260 28
The deposit receipt at 4 per cent. would yield 25th April, 1875, to 27th March, 1876, on $6,180		225 52
And from 27th March, 1876, to 31st August, 1877, on $625		35 42
		$ 260 94

which sum the Prothonotary claims a right to retain to his own use, on grounds in which we cannot acquiesce.

The money was paid in under the Dominion Act, 37 Vic., chap. 31, sec. 1, as compensation for the lands or property taken subject to the order of this Court. The Prothonotary received it, not as the agent of the Dominion Government, as his counsel contended, but as the clerk of this Court, to whom the statute refers. To allow him to hold to his own use the produce of that money, which was in fact the money of the

mortgagee still owing to him, would be an injustice which this Court cannot sanction. We are disposed, however, to make him the same allowance as our Accountant-General receives under the rule of Trinity Term, 1869, being ten per cent. on the bank interest, and direct the rule absolute to be framed accordingly without costs.

IN RE D. BARRY HOLMAN.

Conviction for cruelty to animals quashed, one of the Justices being the father of the complainant.

THIS was a conviction under the acts for the Prevention of Cruelty to Animals. One of the convicting Justices was the father of the complainant, and the proceedings were taken against the father of the children who had committed the acts complained of. The matter was brought before the Court by a writ of certiorari, and the conviction quashed.

Costs refused against the Magistrates, but granted against the complainant.

Rigby, Q. C., for complainant.

Sedgewick for defendant.

END OF REGULAR TERM.

EQUITY APPEAL

WINDSOR AND ANNAPOLIS RAILWAY COMPANY *v.* WESTERN COUNTIES RAILWAY COMPANY.

UNDER R. S., cap. 95, sec. 78, an order for the hearing of an appeal from the decision of the Judge in Equity in vacation need not be given by the Court *in banco*, but may be signed by the judges individually, and the appeal may be heard by the same quorum that would be required for the regular term of the Court.

The allegations contained in an order in Council may be questioned in a suit, and without making the Crown or Government a party to the suit.

A ground of appeal setting out that the judgment is contrary to law and the allegations and statements appearing in the bill and demurrer and the statute therein referred to, and also a ground setting out that the judgment should have been in favor of the defendants for the reasons and grounds raised by the demurrer, "which said reasons and grounds said defendants" (appellants) "here repeat as fully and to the like effect as if they were set out at length," *held* to be of no avail as being too general and indefinite; R. S., *cap.* 95, *sec.* 74.

A ground of appeal setting out that the Judge erroneously decided that the demurrer being bad in part was bad altogether, and that under the practice of the Court the said Judge should have given judgment upon the whole record; *held* bad, as relating only to practice and coming within the exception in R. S., *cap.* 95, *sec.* 73

The power of legislation as to the Windsor Branch, *i. e.*, the line of railway between Windsor and Windsor Junction, belongs exclusively to the Legislature of Nova Scotia, under the 92nd section of the B. N. A. Act, sub-sec. 10, that road being a Local Work, and not coming within any of the classes excepted by the section referred to; and therefore the Act of the Dominion Parliament, 1874, cap. 16, is *ultra vires*; (JAMES, J., dissenting as to this point.)

RITCHIE, E. J., adhered to the views embodied in the judgment appealed from, for which see *Russell & Chesley's* Eq. &c. R., 287.

THIS was an appeal from the judgment of the learned Judge in Equity, overruling the demurrer to the plaintiffs' bill. The decision of the Judge in Equity is contained in *Russell & Chesley's Equity, &c., R.*, p. 288. The allegations in the plaintiffs' bill and the grounds of demurrer are there fully set out.

In the petition for appeal the defendants, after craving leave to refer to the plaintiffs' bill and the demurrer, and to make the same part of the petition for the purposes of the appeal, proceed as follows:—

Your petitioners are desirous of appealing, and hereby signify their intention of appealing from said judgment, and they pray that they may be allowed an appeal herein to the Supreme Court of Nova Scotia from said judgment.

The following are the grounds of appeal from said judgment, and the reasons, amongst others, why said judgment should be reversed, and judgment given in favor of the said defendants with costs.

First. Because said judgment is contrary to law and the allegations and statements appearing upon said bill and demurrer, and the statute therein referred to.

Second. Because the learned Judge in Equity erred in treating the statute passed by the Legislature of Canada on the 16th day of May, A.D. 1874, to wit, chapter 16 of the Statutes of Canada of said year, as a private Act, and construing it strictly.

Third. Because the said statute was passed in the public interests, and with a view to secure the construction of a railway from Yarmouth to Annapolis, and in furtherance of the public policy of the Government of Canada for the time being, and should have received a liberal construction.

Fourth. Because the learned Judge erroneously decided that the said demurrer, being bad in part was bad altogether, and because under the practice now governing said Equity Court, the said Judge should have determined said demurrer upon the same principles as obtain in the Supreme Court,—and in said Supreme Court the practice is to give judgment upon the whole record.

Fifth. Because the said judgment should have been in favor of the defendants and not of the plaintiffs, for the reasons alleged and grounds raised by said demurrer, which said reasons and grounds the said defendants here repeat as fully and to the like effect as if they were set out at length.

Sixth. Because it clearly appears by the said Act that it was the intention of said Legislature of Canada to transfer said railway to the defendants absolutely.

The decision appealed from was delivered by the Judge in Equity March 11th, 1878. On the last day of sittings, May 16th, 1878, an application on the part of the plaintiffs for a special hearing of the appeal was discussed, *Thompson*, for defendants, resisting the application. The Court granted the application, and the appeal was heard sometime in May, 1878.

Thompson, with whom was *Meagher*,—objects to the hearing of the appeal, on the ground that under the terms of the statute, the attendance of all the Judges is required when the appeal is to be heard out of term. There is not the same provision with respect to unavoidable absence of one or more Judges that is made with respect to the work of the regular terms. Takes exception also to the order for the hearing, not being made by the Court, but by Judges individually. (Protesting and reserving rights under these objections, *Thompson* proceeds to read bill, demurrer, judgment of Equity Judge, and petition for appeal.)

On the 2nd May, 1865, a statute was passed, chap. 13, (Provincial Acts) providing for the construction of the Windsor and Annapolis Railway. Chapter 1 of 1866, contains an act incorporating the Windsor and Annapolis Railway Company. That act never went into operation, but is mentioned here because it is the only statute setting out the agreement, though with different parties. Chapter 36 of the Acts of 1867 is the act incorporating the plaintiffs. The next statute affecting this case is section 108 of the B. N. A. Act, which made over the railway line in question to the Dominion of Canada, subject to no encumbrance. The agreement between the Government of Nova Scotia and the Windsor and Annapolis Railway Company was that when the Windsor and Annapolis Railway was completed, the two parties should use the two roads for their mutual benefit, with running powers to both. That agreement constituted no lien or encumbrance upon the line in question; it was a mere contract between the parties to do certain things. My object in stating this proposition is to shew that the Parliament of Canada had a perfect right to legislate respecting this road, unrestricted by any lien. If we had a mere title from the Dominion Government, our position would be different.

Something was said at the previous argument about this road not passing to the Dominion, because altogether within the bounds of the Province; but see section 110 of the B. N. A. Act.

On the 23rd May, 1873, a resolution was adopted by the House of Commons, which is recited in the act of the Dominion Parliament, chapter 16 of the Acts of 1874. The

schedules to this act are important, as shewing what the act ratified. They include the report of the Minister of Public Works, dated October 21st, 1873 approved by the Governor in Council October 22nd, 1873 the proposal made to the Dominion Government by the Western Counties Railway Company, and the report of a Committee of the Privy Council, approved by the Governor in Council, October 30th, 1873. (See *Acts of Canada*, 1874, p. 128).

YOUNG, C. J.—It is singular that the Government promises the Company that no further action will be taken with regard to the arrears until the first of November, whereas the most effective action was taken ten days before that date.

Thompson.—There is nothing alleged in the bill except a statement or promise by the Minister of Public Works; but that did not bind the Government. Section 7 of chap. 12 of the Dominion Acts of 1867, the Public Works Act, provides that no act or deed shall bind the department unless signed and sealed by the Minister and countersigned by the Secretary.

The agreement of 1866 was one for the mutual enjoyment by the Government of Nova Scotia and the Windsor and Annapolis Railway Company, of running powers over each other's railroads.

The agreement of 1871 is not for the mutual enjoyment of running powers, but only for the enjoyment of running powers over the line in question by the Windsor and Annapolis Railway Company. It is evident, therefore, that the mutual running powers contemplated in the agreement of 1866 have not been defined by the parties or settled by arbitrators, as contemplated by the agreement.

I will now take up the grounds of demurrer in the order in which they come. First; It is not competent to dispute the truth of the minute of Council for want of parties, the Government not being a party here. The truth of that minute of Council is directly denied by the bill. It is also alleged that the Government had waived the forfeiture. It is further alleged that the taking possession of the Windsor branch by force in violation of the agreement was unjustifiable, and the bill goes further and affects the rights of the Crown in this important particular that it proposes to put out a tenant of the Crown and put in another whom the Crown has expelled.

Under the lease of 1871 the plaintiff Company was lessee, paying to the Government one-third of the tolls. The Government allege that they were unable to obtain payment, that the lease was forfeited, and they gave a new lease to the defendant Company. It appears to me, therefore, that where the rights of the Government as landlord are brought in question the Government should be made a party to the suit before the Court passes upon so important a point.

Ritchie, Q. C.—The learned counsel is taking grounds that are not in the demurrer or grounds of appeal.

RITCHIE, E. J.—They are not in the grounds of appeal. The appeal should set out that the Judge is wrong in his decision on such and such grounds. The appellant in his fifth ground of appeal merely refers to the grounds in the demurrer.

Thompson.—That is perfectly good,—as good as if we had repeated the grounds taken in the demurrer *verbatim*.

The bill sets out the manner in which the property was transferred to the Western Counties Co. It does not state that the property was transferred to us in fee simple or in pursuance of a statute, but simply that the possession of said branch was transferred, etc. In so far as the statements in the bill are concerned, the defendant may be simply a tenant from year to year, yet the bill prays that we may be driven out and plaintiffs reinstated, without any intimation to the landlord, the Government; *Hovenden* v. *Lord Annesley;* 2 Sch. & LeF., 617. That was the case of two parties holding under a lease from the Crown.

Plaintiffs say that the Government of Canada took the property subject to the plaintiffs' equitable rights under the agreement of 1866, with notice which affects their subsequent grantees, and yet the Government is not a party to the suit. If the Government had been made a party, notice might be disproved, or the existence or effect of the agreement of 1866 might be controverted.

The next ground I take is that the statute is not *ultra vires*. It was contended at the hearing that, inasmuch as there existed in the plaintiff Company under the agreement of 1866, made contemporaneously with the incorporation of the Company, certain rights of property in that Windsor branch, the

Dominion Parliament could not legislate as it did upon the question without violating civil rights which were under the exclusive control of the Local Legislature. We met that in two ways; first, we said that there was no right of property in that road in the plaintiff Company, and nothing except a bare right of action against the Government for breach. Secondly, we said that even if civil rights existed, still, inasmuch as the railway was made a part of the public property, the exclusive right of legislating in regard to it and in regard to those civil rights was vested in the Dominion Parliament and in no other. I contended that, even assuming that the plaintiff Company had a right of property, and that the Dominion Parliament intended to take away that right of property, it had jurisdiction to do so, because the railway was public property and the Dominion Legislature had exclusive jurisdiction. To confirm that view I cited the closing words of the section, (91); "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." "The public debt and property," (sec. 91, sub-sec. 1,) and any matter connected therewith would not, therefore, come within the clause respecting "civil rights." A great many of the matters reserved to the Dominion Parliament involve interference with private property and civil rights; taxation and insolvency, for instance. The point has actually been taken in regard to insolvency in *Kinney* v. *Dudman*, 2 R. & C., 26, in which case, see the judgment of the Court delivered by RITCHIE, E. J. The right of eminent domain remains in the Dominion Parliament. *Cooley on Con., & St. Lim*, 182–6; *16 Gray*, 422; *16 Pick.*, 95; *16 Mass.*, 245; *6 Cranch*, 128.

Now I contend that the act is not a private act. It is not published as a private act. It deals with the public property of the Dominion, and it confers a special authority upon the Government for a public purpose. The old definition as to the difference between public and private Acts is misleading because indefinite. According to that definition a private act relates to a species, and therefore an act relating to the clergy was a public act. but an act relating to the

bishops was private as they constituted a species of clergy. I find in *5 Cruise's Dig.*, p. 3, a case where a statute relating to the property of the Queen herself, and no one else, received the same construction as a public Act.

As to the construction to be put upon the Act, I contend that it gives the property in the railway absolutely to the defendants, or rather, the exclusive right to the possession of it. I cannot see how it is possible to reconcile the statute with the idea that the Legislature intended to legislate as to the title which it had, assuming the lease of 1871 to be in force. The agreement of 1871 gave the exclusive enjoyment of that Windsor branch to the plaintiffs for twenty-one years from the first of January, 1873. If, therefore, we put upon the statute the construction that the Government were only parting with their reversion, it would only give the defendants the road after 1894. It seems to me that the statute cannot be reconciled with that construction. The express words of the statute take away the rights which the plaintiffs claim to have under the agreement of 1871. That agreement gave the plaintiffs the absolute right of possession under their lease for twenty-one years, with the absolute right of renewal at the end of that time. The statute on the other hand gives the defendants the right of immediate possession.

JAMES, J.—It would appear that the Legislature proceeded on the assumption that the plaintiff Company had forfeited their rights under the agreement of 1871.

Thompson.—Suppose the statute even had recited that as a preamble, and it were untrue, that would not defeat the enacting clause. There was a class of cases cited as to the point that if this was a private act it only bound those named in it. Supposing that correct, the Windsor and Annapolis Company are named in this act and are bound by it. The Legislature may, however, in a private act so deal with the subject-matter upon which it legislates, as to bind the interests of private persons without naming them, and it is a pure question of construction, what the Legislature intended to do with the subject-matter, and not what parties they have named. *Maxwell on Statutes*, 3–6; *In re Goodhue*, 19 Grant's Ch. R., 336, *4 Moore's P. C. C.*, 296; *L. R.*, 6 Q. B. 20. That case

was the consideration of a colonial statute. *1 V. & B.*, 477. This is the first of a class of cases where the rights of parties were concluded by dealing with the *corpus* of the estate. The Legislature has bound all persons concerned here by dealing with the railway itself. The statute concludes all the rights of parties interested in the matter by dealing with the *corpus* itself. The same rule is given as a canon of construction in *Dwarris*, p. 122, that an Act of Parliament binds all persons except such as are specially saved by it; *6 Q. B.*, 729. There are some strong passages in *the Earl of Shrewsbury*, 6 C. B., N. S., 157, 184, 218, 222; *Sedgewick on the Construction of Statutes*, 26, 194, 260; see also note on page 25; *Maxwell on Statutes*, 48, 89, 164, 270; *7 DeG. McN. & G.*, 554, as to the point that an Act empowering a company to contract for the public advantage ought not to receive a narrow construction. Upon the question as what are public uses, see *Sedgewick*, 446, note *a*; *L. R., 1 H. L.*, 34. I understood there was a contention below that the Act was *ultra vires*, in consequence of its referring to a railroad which was altogether within the Province. Such a contention cannot be made by the plaintiffs, because all the title they have is derived from the Dominion Government.

RITCHIE, E. J.—They cannot contend that the road is not Dominion property. It is that beyond all question.

Thompson.—In *1 Austruther*, 281, is a case showing that enclosure acts are not private acts. In the case cited, the Rector was not named, although the land was to be sold tithe free, and it was held that his rights were gone. The following cases go to show that the proper remedy for the plaintiffs was ejectment; *Cooper's Eq.*, 125; *3 Vesey*, 4, 343. Upon the question of *ultra vires*, see *L. R., 6 P. C.*, 35, 80.

Henry, (with whom was *Ritchie*, *Q. C.*,) contra.—It must be admitted at the outset that the defendants seek to have a statute construed in such a way as to work a wrong. The question is whether that contention can prevail under the statute and the principles of construction. Before, however, looking at the statute, I will refer briefly to the different points in the demurrer. The first point is as to the joinder of somebody representing the Crown. The only question raised

by this ground of demurrer is this,—can the truth of the order in Council be gainsaid in a case where the Attorney General is not joined. The question is not, as has been to a certain extent argued here, whether the plaintiff can succeed in this action without the Government heing made a party. It may be said in answer to this that the fifth ground raises the question generally as to the necessity of joining the Attorney General. But the question is whether there is any intimation to the plaintiffs that the bill is demurred to because the Government of Canada have an interest in the suit, and should therefore be joined. I contend that there is no such intimation, and that what is contained in the fifth ground of demurrer is simply a recapitulation of what is in the first ground, namely, that we are attacking an order in Council, and have not joined the Attorney General. I make this contention under the statute, that every ground of demurrer must be specifically stated. At the last argument we had a number of cases cited to show that this being an act of state, we must join the Attorney General to succeed in attacking it. That view of the case has been abandoned here, and the defendants have fallen back upon another ground for urging that the Attorney General should have been joined, namely, that it appears that the Government of Canada has a conditional or possible interest in this matter because one tenant of theirs is to be put out and another put in. Now, that contention is not raised by the demurrer; we have no notice of it, and it must therefore be eliminated from this argument. The point as urged here today has not even been raised in the petition for appeal. The petition merely reiterates the grounds of the demurrer, and nothing could better show the absurdity of incorporating the demurrer in the petition for appeal, as a fulfilment of the statutory requirement that the petition should set out the grounds of dissatisfaction with the judgment, than the fact that on one of the points taken in the demurrer, namely, the second, the Judge in Equity is with the defendants.

With regard to the alleged necessity for joining the Attorney General on the ground that this is an act of state, I will not cite any authorities. It is sufficient to say that no rule exists which would prevent the plaintiff from negativing any recital in an order in Council. The statements in an act of parlia-

ment can be denied. *Sedgewick on Construction of Statutes*, (2nd Ed.,) 476. If it is competent to deny the truth and validity of an act of parliament, I do not see why an order in Council should not be controverted. No case has been cited to the contrary. The only reference in *Story's Equity Pleadings*, is in section 222, and that does not sustain the defendants' position in the least.

Even admitting that it is open to the defendants to contend for the joinder on the ground that the Government is interested in the result, I do not see what interest the Government have in the matter. If the act has the signification contended for by the defendants they have no interest in it whatever.

RITCHIE, E. J.—The interest of the Dominion Government is directly the other way. If the defendant succeeds the Government have parted forever with their railroad. If the plaintiff succeeds they become entitled to rent and own the reversion.

Henry.—The only ground on which the demurrer insists on the necessity of the joinder, is that the order in Council is controverted. We did not argue the question as to the alleged interest of the Government in the matter before the Equity Court, and it is not raised by the demurrer or by the petition for appeal.

As to the second ground of demurrer, that is, whether the agreement of 1875 is not void as coming after the Act of 1874, which took away any power that the Dominion Government had to deal as they did with the property,—the consideration of this ground is involved in the consideration of the Act of 1874, and we will admit that if the Act can be held to bind us, this is a good ground of demurrer. If the Act of 1874 can be established against us in the sense contended for by the defendants, the agreement of 1875 is no good.

With regard to the fourth ground of demurrer, it is nothing but a statement that the rights created with respect to this property by the agreement of 1866, do not follow the property to which they are appurtenant. In 1866 the contract was made for the construction of a road from Windsor to Annapolis. In that contract it was provided that running powers should be enjoyed over the Government road. A part of the

by this ground of demurrer is this,—can the truth of the order in Council be gainsaid in a case where the Attorney General is not joined. The question is not, as has been to a certain extent argued here, whether the plaintiff can succeed in this action without the Government being made a party. It may be said in answer to this that the fifth ground raises the question generally as to the necessity of joining the Attorney General. But the question is whether there is any intimation to the plaintiffs that the bill is demurred to because the Government of Canada have an interest in the suit, and should therefore be joined. I contend that there is no such intimation, and that what is contained in the fifth ground of demurrer is simply a recapitulation of what is in the first ground, namely, that we are attacking an order in Council, and have not joined the Attorney General. I make this contention under the statute, that every ground of demurrer must be specifically stated. At the last argument we had a number of cases cited to show that this being an act of state, we must join the Attorney General to succeed in attacking it. That view of the case has been abandoned here, and the defendants have fallen back upon another ground for urging that the Attorney General should have been joined, namely, that it appears that the Government of Canada has a conditional or possible interest in this matter because one tenant of theirs is to be put out and another put in. Now, that contention is not raised by the demurrer; we have no notice of it, and it must therefore be eliminated from this argument. The point as urged here today has not even been raised in the petition for appeal. The petition merely reiterates the grounds of the demurrer, and nothing could better show the absurdity of incorporating the demurrer in the petition for appeal, as a fulfilment of the statutory requirement that the petition should set out the grounds of dissatisfaction with the judgment, than the fact that on one of the points taken in the demurrer, namely, the second, the Judge in Equity is with the defendants.

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value of the new road consisted in the covenant with regard to the enjoyment of certain powers over the connecting line. The question is whether this right of running powers over the Windsor branch will not follow that property; whether it is not in the nature of a covenant running with the land, or a servitude. Is it not in fact a qualified right of way over the Windsor branch, and has it not been so construed by the Government and the parties ever since? In the agreement of 1871 we find that this covenant is rigidly retained as inviolable. Notwithstanding anything which might happen to the agreement of 1871, it is provided by clause 20 that its cancellation should not affect the existing right of the plaintiffs to running powers. That is the effect of the clause as I read it. If the Government and the plaintiffs could not agree to renew the agreement at the end of the period for which it was originally made, the plaintiffs were, as I contend, under this clause 20, to have the agreement of 1866. If, therefore, this agreement of 1871 is legally cancelled, as the defendants contend, but which we deny, the plaintiffs have still a right to running powers, and the only question is whether that right follows the Windsor branch, so as to be available, into whose hands soever it may come

I now come to the two main questions; first, what is the construction of this Act of 1874; and, secondly, whether the Parliament of Canada has the power to pass an act having the effect contended for by the defendants. The Act of 1874 cannot be construed to affect the lease of the plaintiffs. It must be admitted that at first blush the schedules to the Act of 1874 appear to be such as to make the meaning of that act inconsistent with the rights of our Company under the lease. But we are to read the whole act together. The question is, what was the intention of the whole act,—not what are the words in some portion of it. I wish to refer at this stage to the British North America Act, not to raise the question of *ultra vires*, but to ascertain how the Dominion Parliament happened to legislate upon this subject at all. The Dominion Parliament only legislated with regard to the Western Counties railway, because of their owning the Windsor branch. They had nothing to do with the Western Counties railway otherwise. It is a settled principle that we must look at the existing law

in construing a statute, and further that the fact that a particular reading of the statute leads to conclusions opposed to natural justice, is an argument against such a reading. *2 Wendell*, 381. When the resolution of the House of Commons was passed in 1873, the lease to the Windsor and Annapolis Railway Company was outstanding and unassailed, and it was never contemplated that any wrong or injustice was to be done to the plaintiff Company. In the meantime, in October, 1873, the cancellation is made; and in the following year, 1874, an act is passed, without any express reference to the position of the Windsor and Annapolis Railway Company, adopting an agreement made between the Government and the Western Counties Railway Company. Now, we are to look at this act in the light of the occasion upon which the Legislature passed it, and of the principle that no invasion of private rights is to be assumed unless absolutely necessary. The Government having, under the authority of the resolution of Parliament, made an agreement, which agreement, because it dealt with property of Canada, required legislative sanction, went to the Legislature and said; "we have made an agreement, and we want you to sanction it." The Government having dealt with the matter without authority, the Legislature by their act simply said; "we ratify your dealing with the matter, although it was without authority." The act does not mean that every provision, just or unjust, of that agreement, in its minute details, was to be ratified. It was passed only because it was necessitated by that resolution and by the want of inherent authority in the Government to dispose of the property. There is no intention expressed of divesting anyone of property, and such an intention must not be gathered by implication. Whenever a statute gives anything generally and without any special intention being declared, it gives it always subject to the general control of common law. Where a reasonable intention can be given to the act, specific portions of it will be overridden altogether by the judicial power in construing it. If it had been intended to conform to the minute of Council or the agreement in its details, that should have been done in express terms. It cannot be pretended that at the time the resolution was passed, it was intended by the House of Commons to give

away anything that did not belong to them, or to take away anything from the Windsor and Annapolis Railway Company that belonged to them. When we find that the act is based not only on the contract between the Government and the defendants, but also on that resolution which is recited in the preamble, how can we say that the act was intended to do something which the resolution never contemplated, namely, to violate the lease? If this act did not recite the resolution, if it was simply a bald act, taking the property and putting it in the hands of the Western Counties Railway Company, it would be a very different matter. The fact of the resolution being cited aids us. Upon this point see *Sedgewick*, page 203, note "*a*," "Statutes must be construed according to the object to be attained," and, under the dictum of Sedgewick, the Court is enabled to override any little inconsistencies between the wording of the act and its professed object.

The question of *ultra vires* was not elaborately considered by the Equity Judge, because he was so clear on the construction of the act; but that is as important and as clear as any other point in the case. The whole argument upon this question is contained in the British North America Act itself.

As to the distribution of powers between the General and Local Legislatures, see section 91, sub-sections 1 and 29; section 92, sub-section 10, "*a*," 13 and 16; see also sections 94, 108, 111 and 117. At the time of the passing of the act it was no doubt a difficult matter to divide the authorities and give the proper subjects to each Legislature. Sub-section 1 of section 91 gives the Dominion Legislature jurisdiction over the public debt and property; that was because they assumed the public debt and got in return certain property of the several provinces as assets. Schedule 3 enumerates the Provincial works and property which were to be the property of Canada; and the sixth item of this schedule comprises railways and railway stocks, mortgages and other debts due by railway companies. The Dominion has not the right of eminent domain, except for railway purposes expressed in the act. The Local Legislature, as regards this question, has the right to legislate upon "property and civil rights," and "generally all matters of merely local or private nature."

It cannot be doubted that the Local Parliament has a right to legislate upon the Windsor branch, or any other local railway within the Province. As regards a railway, such as the Windsor branch, having its termini in the Province, both Legislatures may have a right to legislate in connection with it. The Dominion Parliament can legislate as to the disposal of their property in that line; but the Local Legislature has the right to legislate upon it for all purposes except as to the property of the Dominion of Canada. This is an answer to the argument presented on this point by the learned counsel for the defendants. The Dominion Legislature, with respect to that branch, stands in no different position from any private individual or company owning a road or a farm. There is no difficulty about the matter more than there would be about a light-house or any other property. The question is really this. What is the public property in this road, admitting that the lease is outstanding?

RITCHIE, E. J.—You come back to this at last; did the Dominion take that road absolutely or subject to any equity which could be enforced against them?

Henry.—We have no English cases at all upon this subject; it is a branch of constitutional law peculiar to the federal systems, and has been abundantly illustrated by decisions in the United States. It seems to me that the whole discussion hinges upon the question, what was the property of the Dominion Government in this road? It has been argued that the Dominion had the whole property in this road in 1871. If so, they gave a lease of it in 1871, and, even admitting that that lease required parliamentary sanction, the defendants have not attacked it in this suit. But, if that lease is to be considered as outstanding, it is perfectly clear that the Dominion Parliament had no power to divest the plaintiff Company of their rights under the lease. It is contended that they have the power to override private rights in this matter, and the concluding portion of section 10 has been cited in support of the contention. That clause, however, was not added for any such purpose, but was inserted simply to provide for doubtful cases. My argument is that both Legislatures have a qualified right of legislation in reference to this road. The Dominion Parliament can legislate as to the disposal of the property of the Dominion in the road while the

rights of the plaintiff Company under their agreement and lease are subject to the exclusive jurisdiction of the Local Legislature, under the clause giving that Legislature jurisdiction in matters of property and civil rights.

Thompson.—The contention of the learned counsel is that the moment the Government convey away a piece of property the right of Parliament is gone altogether.

Henry.—I did not say that, but I am quite willing to say it. Once the title is absolutely gone out of the Dominion, the Parliament of the Dominion has no right to legislate in the matter. It seems to me clear that what is meant in the act is that the Legislature of Canada, from time to time, while the British North America Act remains unqualified upon this point, shall have the right to legislate upon public property, consistently with the laws as to civil rights, which are expressly reserved for local legislation. Now, if they must legislate consistently with the laws of the Province in reference to civil rights, how can it be said that they can take away our vested rights in the railway, simply because they have a property in the same subject matter. I am now arguing on the assumption that there was an outstanding lease of the Windsor branch. If the Dominion Legislature have the exclusive right to legislate upon the matter, although the lease is outstanding, what is the significance of giving the Local Legislature a right to legislate at all?

It is admitted that the Imperial Legislature is supreme, but the Dominion Legislature has not a right to deal with private property in the Province. Even if the right held by the Windsor and Annapolis Railway Company existed as to a railway having termini outside of the Province, such rights, being private rights, would be free from any interference at the hands of the Dominion Legislature. Suppose that the Windsor and Annapolis Company held Government bonds on the Intercolonial Railway, would the fact that this road extends beyond the limits of the Province entitle the Dominion Legislature to interfere with those bonds? The right of the Dominion is analogous to the right of a farmer in his farm, and the Dominion Government must hold its rights subject to the laws of the Province. The Provincial Legislature could by act take away the right of the Company under its lease

and transfer it to the Western Counties Railway Company; but the Dominion Legislature has no such right. See *Brice on Ultra Vires*, 45 and 46, citing a case reported in *22 L. J. Ch.; Shrewsbury R. Co.; Cooley on Constitutional Limitations*, 9; *Sedgewick*, 409.

It has been said that a number of the provisions in the Act of Union trench upon private rights, but those provisions necessarily interfere with private rights, as they are adopted for the accomplishment of general purposes. Was it necessary in this case that legislation as to the ownership of Dominion property should interfere with the rights of private persons? If not, that act of the Dominion Legislature is *ultra vires*. The legislative powers of our parliaments are not at all different from the powers of corporations as to the passing of by-laws. Before Confederation our Local Legislature had exactly the same power of legislation as the Imperial Parliament, except that it was subject to the control of that Parliament; but it could do just as high-handed acts as the Imperial Parliament. By the British North America Act certain of its powers were taken away and given to the central Legislature; but whatever is not given to that Legislature remains with the Local Parliament. Our condition in regard to this is exactly the same as that of the United States. Sedgewick, whose work is entitled to great weight, puts them on the same footing. Referring to the union between Upper and Lower Canada, he puts the constitutional status of those Provinces on the same footing as that of the several states of the Union. See also *Cooley on Constitutional Limitations*, 106. The British North America Act purports to divide the subjects of legislation between the General and Local Legislatures. The Local Parliament has the right to deal with questions of property and civil rights. The General Legislature has the right to deal with questions affecting public property. The only way in which these two powers can be reconciled, is to hold that the Dominion Parliament can legislate as to its rights of property, while the Local Legislature has, in addition to this right of legislating in regard to whatever property it may have, the general power of legislating with respect to all civil rights existing in the Province, L. R., 6 P. C., 31, 272. In the latter case the railway was one extending beyond

the limits of the Province, and it was urged that, because it was one over which the Dominion Legislature had jurisdiction, a local act was *ultra vires;* but it was held that because the act dealt with local matters and private rights, the Local Legislature could deal with it. See also *41 U. C. Q. B.*, 255, and *Keefe* v. *McLennan; 2 Russell & Chesley*, 5.

If the Dominion Legislature has the right to legislate generally over railways as public property, what is the significance of specially giving them power as to those extending beyond the Province? Suppose the Dominion of Canada had a lease for twenty-one years, and the reversion was owned by the Windsor and Annapolis Railway Company, could the Dominion Legislature pass an act taking away this reversion and giving it to the defendants? Suppose there were rival claims to a lease of a hundred years, could the Dominion Legislature, reciting the dispute, confirm the right of one or other of the claimants? Certainly not. If any power could do so in this country the Legislature of Nova Scotia could, because it involves a question of private right. Under section 91 the Dominion have exclusive legislative authority over beacons, buoys, light-houses and Sable Island. Suppose A. B. rented to them his land for twenty-one years for a light-house, under the construction contended for, they would have power to declare that he had no rights in the land at all; and they could declare that the fee simple was vested in somebody else; or, they could confiscate one man's ferry-boat and give it to another. It has been contended that the agreement of 1871 was not authorized by the agreement of 1866, incorporated in the Company's charter, or rather that the agreement of 1871 went beyond the undertaking contained in the agreement of 1866. My answer to that contention is that the point has never been raised until now, that it is not in the demurrer nor in the petition for appeal. In conclusion, what plaintiffs depend upon mostly is that the Dominion Legislature, under the British North America Act, has nothing to do with this railway, except for the purpose of disposing of their own property in the road as they please.

Ritchie, Q. C., takes the preliminary ground that a demurrer as to questions of practice could not come up in the Equity Court or be brought here by way of appeal to this Court.

The Act of 1874 was a private act; it was for the benefit of a private company and confined to local purposes; but I am not driven to that, because I contend that it would receive the same construction if a public act that it would as a private and local act. The distinction is almost abolished here and in the United States, although in England it is kept up as a question of pleading. There are a large number of public acts that require a strict interpretation. *Maxwell*, 268; *Potter's Dwarris*, 251, 255, 257. These citations all refer to public and not to private statutes. The case reported in *L. R., 1 E. & I. Appeals*, 34, was cited to show that acts referring to canals were public; but it cuts both ways, because it shows that acts relating to those subjects were to be strictly construed. After all, the question comes down to the two important points; whether this act was intended to take property away from the plaintiffs, and secondly whether it is *ultra vires*. The learned counsel for the defendants commenced with the idea that the British North America Act gave this property to the Dominion free and clear of all encumbrances. Now, if that act had by precise language vested the Windsor branch railway in the Dominion Government free from all encumbrances in so many words, there might be some argument, but it does not do that. Section 108 says that "the public works and property of each Province, enumerated in the third schedule to the act, shall be the property of Canada." It is only the public works and property of each Province that are to become, under this section, the property of Canada. Anything which is not the property of the Province is not the property of Canada. Now, if this railway was subject to any equitable rights, the Legislature of the Dominion took it subject to those rights. Even the schedule to the act does not refer to the Windsor and Annapolis Railway, it simply says railways and rolling-stock. The Dominion of Canada took whatever title our Government had and no more. They took custom houses and it was in connection with that that there was a rent charge. But did they take them independent of the charge? Not at all! The Government paid the charge off. My point is simply that they took just what title the Province had and nothing more. Now, it is indisputable that the Windsor and Annapolis Rail-

way had some rights over the Windsor branch which entered into the value of their road. Their rights were recognised all along by the Government, and a reference is made in the agreement of 1871 which can relate to nothing else. That agreement provides that on its termination any rights which the Windsor and Annapolis Railway Company had at the time of the agreement would still continue. The agreement of 1871 was in fact a lease of the whole road, and the plaintiffs did not require any other agreement; but yet it was provided that if anything happened to cause that lease to fall through, they were to be enabled to go back to their original rights. There has been an attempt to attack that lease of 1871; but I do not intend to go into it, because it is not in the demurrer. I think, however, it is admitted that that document is correctly executed and in force.

Now, taking up the question of interpretation, I will refer in the first place to the facts. The Windsor and Annapolis Railway had this lease, known to all parties, and alleged to be known to the Western Counties Railway Company, which allegation we must assume to be true. It was known to the Government. The Government in 1873 passed a resolution authorizing the Government to enter into negotiations for the transfer of the Windsor branch railway to reliable parties who would construct a railway between Annapolis and Yarmouth. This resolution is not inconsistent with the Company's lease, because the Government were in possession of the road and were keeping it in order all the time. The transfer under that resolution was not at all inconsistent with the lease to the Windsor and Annapolis Railway Company, because they were but transferring the ownership; but that resolution implied this, that the road was not to be transferred until the western road was completed.

The Western Counties railway wanted to vary a little from that, because they wanted to get the benefit of whatever was accruing from this Windsor branch road before they completed the road to Yarmouth. That is the reason, as I understand it, why the proposition assumed a shape different from the resolution; at all events they wanted to say that it was under their control. Now, on the 2[illegible]th day of October, when they made this application, the lease of the Windsor and Annapolis

Railway Company was not forfeited or touched in any way. The defendants made that application knowing of the lease. The lease had not been cancelled when they made this application or when it was accepted, and no attempt was made to cancel it until the 22nd. They all knew that the lease to the Windsor and Annapolis Railway Company was outstanding.

YOUNG, C. J.—Must you not take these three things all together?

Ritchie, Q. C.—Yes. There was collusion between the Government and the Western Counties Railway Company, to cheat the Windsor and Annapolis Railway Company. The report was made accepting their memorandum on the 21st. All that the act does is to say that the Dominion Government can have power to make that agreement. That is all you can get out of the act. It does not say that the road is to be vested in the Western Counties Railway Company. It says,—you have made an agreement with the Western Counties Railway Company at a time when you had no power to make it; we give you that authority. It does not give any title. Is that sufficient to affect the rights of third parties; to give a clear title to the defendants and cut out all rights? I contend it is not, that it only goes to the extent of giving what the Government has and nothing more. The Government kept it under the old arrangement, and never handed the road over to the Western Counties Railway Company until two or three years afterwards. The proposition from the Western Counties Railway Company was put in before the cancellation of the lease, and the Windsor and Annapolis Railway Company was never notified at all. The Government was bound to see that the road was maintained, the Windsor and Annapolis Railway Company had not to maintain it, but only had running powers over it; and the act declares that the Government were to continue the management of it for four years.

Now, as regards the question of *ultra vires*, I think it is admitted that the Dominion Government had a right to legislate upon the property of the Dominion, that is to say, in regard to what they owned, and that the Local Government had the exclusive right to legislate as regarded private rights and interests. In interpreting this statute I think you are

bound to adjust the powers of each legislature in such a way that they will not conflict with one another. The Local Legislature must have jurisdiction over civil rights, and the General Legislature must have the power to dispose of their own property. If the Dominion Government were to deed away their interest in the road to-morrow, their power to legislate for it would cease from that time, being co-extensive with their property in the road and extending no further; in other words the lease of 1871 bound them, and they were in the same position with respect to the control of the property as any other party in the same position would be. This interpretation gives to each legislature its own powers, and there is no conflict.

McDonald, Q. C., in reply.—The plaintiffs are claiming under an instrument not granted by any authority whatever, but by a subordinate minister of the Crown, the Minister of Public Works, whose authority depends wholly upon the act which constitutes his office, while we, on the other hand, claim title under an Act of Parliament, the highest authority known to the Constitution. If the Parliament of Canada had the power to pass the act, and did pass the act, it does not become us to refine upon it, and inquire what the intention of Parliament was, or whether the act was iniquitous. It would not be becoming in any Judge to say whether an act was iniquitous or not. The Parliament had the power to pass an Act making this property the property of the Western Counties Railway Company, and if a wrong was done there would be a remedy. It would be contrary to every principle if a public object could not be attained because private rights were interfered with.

There is no power or authority in the act incorporating the plaintiff Company to justify the agreement of 1871, and yet it is claimed by the plaintiffs that that agreement was made in pursuance of the act of incorporation.

The moment it is admitted that the Local and Dominion Legislatures have concurrent jurisdiction the plaintiffs' case falls. If the Dominion Legislature has a concurrent right, or any right whatever, its legislative authority under the concluding clause of section 91 must be supreme. A minute of Council could not convey away the public domain or pro-

perty, but the Legislature had ample power to do so, and they have done so by the act of 1874.

The constitutional question has been argued in this case as if the distribution of powers here was the same as that in the United States between the Local Legislatures and the Federal Congress. That is a mistake, and the distinction between the two cases is of importance. There the powers not expressly committed to the central legislature are reserved to the local legislatures. Here the positions are exactly reversed, and all powers not expressly given to the local legislatures are reserved to the central parliament. The legislative power of the federal parliament here is, therefore, much more ample, and the presumptions in favor of its acts being *intra vires* are stronger. The authority of the Dominion Parliament is as extensive as that of the Imperial Parliament, except as to those subjects that are withdrawn from it and reserved to the local legislatures. The closing words of section 91 expressly provide for cases of doubt, and where there is a conflict of authority the preference is given to the general Legislature.

If the contention of the plaintiffs is sound as to this matter being a subject of exclusive jurisdiction on the part of the Local Legislature, because there is a lease of the road held by plaintiffs which constitutes a private right, it follows that whenever the Dominion parts with an inch of its property over which it has exclusive jurisdiction, it creates a private right in favor of its grantee, and the authority of the Local Legislature is invoked. It cannot thenceforth deal with such property in any manner, no matter for what public purposes, or how beneficial the objects in view, without trenching upon the powers and jurisdiction of the Local Legislature.

The act of 1874 is not a private act in any respect. It is an act put on the statute book for a public purpose. The company is a private company, but they are acting under a public act passed for the benefit of the country generally, and the injury done to the plaintiffs as contended by their counsel is nothing compared with the injury that would be done to the defendant Company if the undertaking with them were violated. That undertaking was that they were to have this piece of road.

Assuming that the Legislature had the power to pass the act of 1874, the question remains as to the construction to be placed upon that act. As to this I cannot see what construction can be put upon it other than the one we contend for. The act can have only one meaning, and that is that the defendant Company is to have the absolute possession of the branch line on the completion of their road.

As to the ground that the Government should have been made a party, it seems to me that nothing could well be clearer. The decree of the Court, if in favor of the plaintiffs, will impose a burden upon the Dominion. The Government certainly have an interest in the matter, and should be represented by their Attorney General being made a party.

SIR WILLIAM YOUNG, C. J., now, (August 29th, 1878,) delivered the judgment of the Court:—

THE Equity Judge, on the 11th of March last, having given judgment for the plaintiffs on a demurrer to the whole bill, the defendants, on the 20th March, filed a petition for appeal, and the plaintiffs, on the affidavits of Messrs. Innes and Lynskey, moved for a hearing under the Revised Statutes, ch. 95, sec. 78; and on the 29th of May an order therefor was signed by five of the Judges. The hearing was had on the 9th and 10th of July, before the Chief Justice, the Equity Judge, and Judges DESBARRES, SMITH and JAMES, when certain preliminary objections were taken, which must be first of all disposed of. It was urged that an order for a hearing in vacation under the above sec. 78, could only be given by the Court *in banco*, and that such a hearing could only be had before the full bench. Now, the first of these objections, if sound, would go far to defeat the object of the clause, which was obviously to facilitate the hearing of equity appeals at any time during the year, and, there being only one term now of the Supreme Court, during two-thirds of the year, the provision would be inoperative. The Act of 1876, ch. 13, provides that five Judges shall constitute a quorum to decide all matters requiring to be heard by the Court *in banco*, and to insist on all the seven Judges being present at such a hearing, would render it impossible were one of them absent or unwell. In the present case one of the Judges was out of town, having

just returned from Europe, on leave of absence; and another had a delicacy in acting, having been a member of the Dominion Government when one of the orders in council impugned in this case was passed. A preliminary objection, in the course of the argument, was raised as to its extent. By the 73rd and 74th sections of chap. 95, an appeal from the Equity Court does not lie in matters of practice, and the intention to appeal shall be signified by petition, succinctly stating the grounds of appeal. Now, there are five grounds of demurrer, on all of which the appellants claimed a right to be heard under the general terms of the petition, while its specific statements cover only a small part of the case. We did not feel ourselves at liberty to restrain or interrupt the argument, which was understood, indeed, to be only preliminary to a further appeal; but then expressed ourselves, and are still of opinion, that the first and fifth grounds in the petition are of no avail, as being too general and indefinite,—that the fourth relates only to practice and comes within the 73rd sec. of chap. 95; and that the appeal is practically confined to the second and third grounds.

We cannot but express our regret too that the case comes before us on demurrer, obliging us to assume all the statements in the bill as not only the truth, but the whole truth; when it is obvious, from the affidavits resisting the hearing, and from what transpired at the argument, that several of these statements will be contradicted or qualified.

The two papers before us, the bill and the judgment, both of which must be read in connection with this opinion, enter so fully into particulars that we shall treat the several statutes and documents as incorporated with it, avoiding thereby any useless repetitions.

The first enquiry relates to the agreement of the 22nd November, 1866, to be seen at large in Appendix No. 15 to the Journals of the Nova Scotia Assembly for 1867, the 11th section of which is set out substantially in the bill, and the whole incorporated with the Provincial Act of 1867. This agreement was in force, binding the Government, and was undoubtedly one of the main inducements for the construction of the railway at the passing of the British North America Act, which, by sections 108, 110, and the third schedule thereto,

transferred to the Dominion as its property the Windsor branch of the Government railway running between Windsor and the Windsor Junction, and known as such, but misdescribed in one of the agreements as the Trunk line. It is contended that the branch passed absolutely to the Dominion, free of all obligation, equitable or otherwise, under the agreement of the 22nd November, 1866; and it is clear that the agreement in no way affected the title. But it may be asked was not the title coupled with an implied or constructive trust, binding a Government just as it would bind an individual. We are here in an Equity Court, and all the equities are surely with the plaintiffs on this point. The rule is laid down in *1 Spence's Equitable Jurisdiction*, 509, 511, and 219; *2 Id.*, 194, and *Hill on Trustees*, 116, that where a person, taking the legal estate in property, cannot enjoy the beneficial interest without necessarily violating some established principle of equity, the Court will immediately raise a constructive trust. Suppose this branch, or any other portion of the provincial property, had been under lease or agreement under seal for a legitimate purpose, could the Dominion Government arbitrarily set aside all such contracts and violate the rights of individuals or companies, honestly acquired. This I am sure of, that neither the British Parliament would knowingly confer, nor the Dominion Government knowingly exert a power so oppressive and unjust.

Nor did the Dominion Government exert it in this case, for the agreement of 22nd September, 1871, is a substantial reassertion, a recognition with some wholesome modifications and changes, of the agreement of November, 1866. This lease is almost as remarkable for what it omitted as for what it contained. It was for a term of no less than twenty-one years, from 1st January, 1872, "to be then renewed on the same conditions, or such other conditions as might be mutually agreed on," giving the Dominion Government a complete control and check on a renewal. It stipulated for a monthly payment by the Company of one-third of the gross earnings from the traffic carried by them over the branch, but made no stipulations of re-entry in case of non-payment. The only clause of that kind was the 19th, to take effect in the event of the Company failing to operate the railways, (it did not say for how long,) between Halifax and Annapolis.

The plaintiffs aver in their bill, and for the purposes of this argument we must take it as admitted, that they never failed in operating the railway, and, while exercising their running powers under the agreement, fulfilled all the conditions thereof, except the payment of the rent. This they withheld in view of some equitable claims on the Government, but paid the arrears in November, 1872, which the Government accepted.

Such being the state of affairs, according to their bill, the next step was a resolution in May, 1873, not of the Parliament as alleged in some of the proceedings, but of the House of Commons, authorizing the Government to enter into negotiations for a transfer of the Windsor branch to some association or company who would extend the railway from Annapolis to Yarmouth. We must infer that this was done in obedience to the desire, and to carry out the policy of the Government, but, as a resolution of one branch of the Legislature could have no effect on the rights of the Company, it was made subject, on the face of it, to the approval of Parliament. We may be assured that so significant a resolution as this did not escape the notice of the plaintiffs, but nothing is said of this in the bill, and, the rent having again fallen into arrears for the same cause as before, the Government gave the plaintiffs time to the 1st November, 1873, to pay the arrears.

A few days before, however, on the 20th October, 1873, the defendants, having been incorporated by the Legislature of Nova Scotia in 1870, entered into an agreement with the Government in the shape of an accepted proposal, undertaking to build the railway from Annapolis to Yarmouth, with all reasonable despatch, the Government, on their part, agreeing that on the completion of the same, (being then in progress of construction,) the branch railway should be and become absolutely the property of the defendants. The Government further agreed that the defendants should have running powers over the Intercolonial railway between Halifax and Windsor Junction, with such privileges as had been theretofore granted in the agreement with the Windsor and Annapolis Company. This agreement, on the recommendation of the Minister for Public Works, was approved on the 22nd October, by the Governor General in Council, subject to the

approval of Parliament. A second order in Council was passed on the 30th October, the principal clause in which I have already cited.

The terms in the minute of Council of 22nd October are stated in the bill, founded on the report of the Minister of Public Works that the plaintiffs had failed to operate the railway known as the Windsor branch, mentioned in the order in Council of 22nd September, 1871, and to comply with the other terms and conditions of that order, which the plaintiffs in their bill deny, and that they owed $30,000 to the Government, which they had failed to pay. This report is not given, nor is the order of 22nd October recited at large, nor the grounds for it assigned in the Act of 1874, on which the defendants rely. The plaintiffs aver that they had no official or other notice of the proposal and agreements thus depriving them of their running powers and vitally affecting their interests without their being heard. But the counsel of the defendants contend and set out as one of the grounds of demurrer, that the order in Council was an act of state, and that the allegations in it could not be questioned by the plaintiffs any more than if they had been in the record of a Court of Justice. No authorities, nowever, were adduced in proof of this position, which I concur with the Equity Judge, for the reasons he has given, in rejecting.

The Act of 1874, in which the Dominion Parliament approved of the agreements of October, 1873, and declared them to be as effectual as if they had been entered into in pursuance of sufficient authority given before their adoption by act of the Parliament of Canada, is, in my view, not only the main strength and support of the defendants, but the only pillar on which they can lean. But before entering on this branch of the argument, let us look at the most singular feature in the case, the agreement of 20th June, 1875, more than a year after the Act of 1874 had passed. The second section of that act had authorized the Government, until arrangements were completed for giving possession of the Windsor branch to the defendants, to make such other arrangements as might be necessary, by continuing the working of the same by the Windsor and Annapolis Company, or otherwise. But the agreement of June, 1875, goes far beyond that,

not only by declaring at the close that the agreement of 22nd September, 1871, except as therein altered or modified was in full force and effect, but by various provisions, for an apparent continued possession. The plaintiffs, on their part, contracted and agreed at their own cost to change the gauge of their railway from Windsor to Annapolis before the first of July, to deliver over to the Minister certain engines and trucks therein mentioned, and to execute a release of all claims and demands on the Government to that date. And the Government, on their part, agreed, on the change of gauge being effected, to extinguish and discharge all claims on the plaintiffs up to the 1st of January, 1875, and to deliver to them certain engines and trucks therein mentioned, the same to remain the property of the Government. It is then stipulated and distinctly understood and agreed that nothing therein, (except as to discharging the indebtedness and claims therein above named,) should vary or interfere with the terms of the agreement under which the plaintiffs held the branch line, but that the gross earnings of the said branch from the 1st of January, should be paid by the plaintiffs on the 31st of July, and thereafter monthly to the Government of Canada.

This agreement is declared in the bill to have been prepared under the direction of the Minister of Justice, and executed by the minister of Public Works, and accepted and acted on by the Government and the plaintiff Company. The plaintiffs allege that they changed the gauge of rails on their railway, and delivered up their engines and trucks, that they continued in exclusive and undisturbed possession of the Windsor branch, and continued to operate the same, and paid the rent until the 1st of August, 1877, (that is for two years and seven months,) when forcible possession was taken of the branch by order of the Government, and they were removed therefrom against their will.

But, notwithstanding all this, requiring explanations and a defence not before us, and which hereafter may be supplied, it is clear that if the act of 1874 transferred the right of possession to the defendants, the agreements of September, 1871, and June, 1875, on which the plaintiffs rely will not avail them. We were told by the defendants' counsel that we had nothing to do with the *morale* or justice of the case, but only

with the controlling power of the Dominion Parliament, and the legal effect of the act. To this main question then let us now address ourselves.

Let us first of all consider the act in the light so strongly urged by the defendants' counsel, viewing it as being of the same force as an act of the Imperial Parliament. The cases on this head are numerous, as they are cited in *Maxwell on the Interpretation of Statutes*, 3 to 6; *Sedgwick's Treatise*, 194 to 196, and other text-books. They establish a clear principle of law, as appears from two or three of the cases which I shall content myself with citing.

In *Logan* v. *Burslem*, 4 Moore's P. C., 296, it is said by Lord CAMPBELL in giving judgment; "As to what has been said of an act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable; and all we can do is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put upon them. But still it is a question of construction, and there is no power of dispensation from the words used."

In *Phillips* v. *Eyre*, L. R., 6 Q. B., 20, WILLES, Justice, says of a Colonial Act; "A confirmed act of the Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

What is this operation and force? That the will of Parliament clearly expressed must be obeyed, however unjust or arbitrary it may appear. When once the intention is clear, it is not the province of a Court to scan its wisdom or its policy. The authorities go to this length in dealing with a public act, where the intention of the Imperial Parliament is plain and not to be mistaken.

But there are two material considerations affecting this act of the Dominion Parliament; first of all, its limited authority as compared with the Imperial Parliament, and, secondly, the nature and character of the act as affecting

individual interests. The Imperial Parliament, in the exercise of its sovereign power, called into being by the British North America Act, 1867, new sets of legislatures, deriving their authority from it, and plainly distinguishable from the legislatures it superseded. Of these the Dominion Legislature has the controlling and the largest power, but a power far inferior to that of the Imperial Parliament, because limited and restrained in its exercise, and expressly excluded from whole classes of subjects assigned to the local legislatures. This view is touched upon in the judgment we are reviewing; but I feel myself constrained to give it greater prominence, now that it is here. The British North America Act, in its 92nd section, defines the matters on which the legislature in each province may exclusively make laws. Among these, by sub-section 10, are local works and undertakings, other than, *inter alia*, railways connecting the provinces with any other or others of the provinces. These last, that is, all railways connecting a province with any other Province, or extending beyond the limits of the Province, by the 29th sub-section of section 91, are within the competence of the Dominion Legislature; and by the 92nd section all other railways not connecting a Province with any other nor extending beyond the limits of the Province, are within the exclusive competency of the Local Legislature. In the above section 10 there is another exception (letter "*c*") of such works as, although wholly situated within the Province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. It was to meet this exception, I presume, that by the Dominion Act of 1875, (38 Vic., ch. 22,) extended by the Act of 1876, (39 Vic., ch. 16,) the line of railway from Halifax to Pictou, and from Richmond to North Street in Halifax was declared, with other lines in New Brunswick and Quebec, to constitute and form the Intercolonial railway, and to be vested in Her Majesty, and under the control and management of the Minister of Public Works.

But I have sought in vain for any such declaration as to the Windsor branch, and as that branch neither connects our Province with any other, nor extends beyonds its limits, it seems to me that the power of legislation, as to that branch,

belongs exclusively to the Local Legislature. This is not inconsistent with the ownership, or property, and the management of the branch being in the Dominion Government, who would be protected from any ill-advised or hostile legislation by the acts of the Governor General under sections 55 and 90, and the orders of the Minister of Public Works would be obeyed and enforced by our laws as to that branch, just as they would with regard to any other property.

This view of the matter was not at all presented at the argument, and, as the result of an enquiry had for the first time, was new to my own mind. If sound, the Act of 1874 was an excess of authority and beyond the jurisdiction of the Dominion Parliament, a conclusion I have come to after much thought, but which I will be pleased to see deliberately reviewed.

Entertaining this opinion, and conceiving that the other grounds of demurrer and of appeal are insufficient, I am relieved from the necessity of going at large, as the Equity Judge has done, into the distinction between public and private acts, and the construction to be fairly put upon the Act of 1874; and, as that act in my judgment does not sustain the defendants' claims, I concur in the demurrer and appeal being dismissed with costs.

Upon the respective jurisdictions of the Dominion and Local Legislatures, and as having some bearing upon the present case, I would cite *Dow* v. *Black*, L. R., 6 P. C., 272; *Regina* v. *McMillan*, 2 Pugsley, 220; *Regina* v. *Justices of Kings County*, 2 Pugsley, 535; *Keefe* v. *McLennan*, 2 Russell & Chesley, 5

JAMES, J. delivered the following dissenting opinion:—

I quite concur with the decision of the learned Chief Justice upon the preliminary objections taken by the defendants' counsel. I think the three principal questions involved in this case are,—

1. What were the nature and extent of the title to the Windsor branch vested in the Government of Canada at the time of the passing of the Act of 1874?

2. What were the nature and extent of the legislative jurisdiction of the Parliament of Canada over the railway at the time of the passing of that Act?

3. What were the legal effects of the Act of 1874? Did it or did it not vest in the defendant a right of possession to this railway?

I am under the necessity of considering the first question, because it is necessary that I should do so, in view of the conclusion at which I have arrived upon the other two questions. If the Dominion of Canada never had a title vested in it except one of limited extent, I think it follows as a necessary consequence, as urged at the argument, that the jurisdiction of the Parliament of Canada was limited to the same extent. I must, therefore, look at the origin of the title of the Government, which was undoubtedly the British North America Act.

The plaintiffs, in their bill, claim that the title was limited by the agreement of 1871 between the plaintiffs and the Dominion Government. I shall consider this question afterwards, and for the present confine myself to the operation of the British North America Act under which alone the Government of Canada can claim any title to the property in question.

That act ought, I think, to be construed with extreme liberality. Its scope and effect are to transform three great provinces, each with a separate and independent Legislature possessing almost national powers, into one great Dominion, with a central Legislature; to re-settle the provincial governments and legislatures with limited powers and upon a new basis; and to vest in the Central Government and Legislature all the public property of the separate provinces and all the powers withdrawn from the provincial governments and legislatures. It also provides for bringing several other provinces, by subsequent arrangement, under the operation of the act. It is rather in the nature of a treaty between nations such as that recently accomplished at Berlin, than an ordinary act of Parliament. Its provisions are expressed with extreme brevity, and in the most general and comprehensive terms; and, if the principles of construction applied to ordinary acts of Parliament are applied to it, instead of giving it the very liberal construction which its nature and circumstances demand, in my opinion, the most mischievous consequences must necessarily result.

The Act says; (sec. 108,) "The public works of each Province enumerated in the third schedule to this Act shall be the property of Canada."

And the third schedule is as follows:—

1. Canals, with lands and water power connected therewith.
2. Public harbors.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements.
6. *Railways* and railway stocks, mortgages, and other debts due by Railway Companies.
7. Military roads.
8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as ordnance property.
10. Armories and drill sheds, military clothing, and munitions of war, and lands set apart for general public purposes.

This is all the legislation contained in the Act to transfer property of the value of scores of millions of dollars, of the most varied description, and including an important island, a dependency of this Province.

At the time of the passing of the Act, the Province of Nova Scotia owned the railway from Halifax to Windsor, a part of which is the subject of this suit, and had made a contract in relation thereto with the plaintiffs, as a part of the consideration to induce them to construct a continuation of the line from Windsor to Annapolis. This agreement provided for reciprocal running powers over the whole road by the government and the plaintiff company when their road should be constructed.

It is contended by the plaintiffs that this agreement limited and restricted the title of the Province of Nova Scotia in the Halifax and Windsor Railway, in such a way that the title to it did not pass to the Government of Canada, except as limited and restricted by the terms of that agreement.

I cannot concur in this opinion. It cannot be denied that the Imperial Parliament had power to pass to the Dominion of Canada a complete and perfect title, as its language purports to do,—for there are no exceptions or reservations in the Act in relation to the subjects enumerated in schedule 3, and transferred by s. 108; and if we hold that these vast and varied properties passed, subject to, and limited by all the various claims and interests previously existing in relation to them as against the several provincial governments, probably there is scarcely one of them which would be held by the Government of Canada, free from some embarrassing and mischievous question such as that now before us. Some of them were in course of construction or repair; others of them were leased to third parties; and we know not how many of them were subject to special agreements and arrangements, the whole of which ought to come under the control of one directing head, in order to their efficient control and management. If the owners of a ship cannot agree on her management, the exclusive control is vested by the Admiralty Court in one of them. How much more is it necessary that there should be unity of management in the case of a railway? If an unrestricted title did not pass to Canada the *modicum* of title necessary to protect the plaintiffs' interest under the contract of 1866, remained in the Provincial Government, and it would be necessary that a joint commission should be appointed for the management of the road, in conjunction with the plaintiffs. This would have necessitated legislation. Neither the Dominion Parliament nor that of Nova Scotia could pass such an act, nor could a joint act of the two Legislatures be passed to confer the needful powers, and therefore it would be necessary to resort to the Imperial Parliament for an act. If the title was transferred by the act, as contended by plaintiffs' counsel, then the Province of Nova Scotia retained an interest in the road co-extensive with the plaintiffs' claim, for which the Province was, and still is, entitled to compensation from some quarter.

Again, the question is still further complicated by the adoption of the line from Halifax to the junction as part of the Intercolonial line; whereby the Provincial Government would forever be the plaintiffs' landlord, as regards the run-

ning powers, and the Dominion Government for the remainder. In short, the complications arising from such a state of the title would be innumerable, and such as I cannot think could possibly have been intended by the British Parliament, which I think intended to pass the whole title, including all private claims upon the property, to the Dominion Government. I can see no objection to this view of the Act. It protected the rights of all private parties against the Local Government, or against the property in the hands of the Government, by section 111, which enacts as follows; "Canada shall be liable for the debt and liabilities of each province existing at the Union." It can hardly be questioned that the plaintiffs' right under the contract of 1866, whether binding on the property or not, was a "liability" of the Province, and, by this clause, the Dominion of Canada was unquestionably made 'liable" to fulfil that contract. Yet it is contended that the Government which assumed and was legally subject to the liability did not take, under the Act, the title necessary to enable its fulfilment. I cannot conceive that the British Parliament intended to create such complications, leading, as could be easily pointed out, to endless litigation and difficulty. The improbability is greatly enhanced when we consider that when Parliament gave Canada the railway, it also gave Canada a legislature. If the title was restricted, the right of legislation was restricted also. In this the plaintiffs' counsel are undoubtedly right. But if the title was complete and the legislative power of the Dominion co-extensive with it, then would these difficulties and complications not only be immensely reduced, but a power would exist in the Dominion to control, direct and harmonize the whole. And this, I think, was the policy of the Act, viz., to pass the title in brief and comprehensive terms, leaving it to the subsequent legislation of the Canadian Parliament to arrange details and remove unexpected difficulties which might occur in putting the Act in operation.

That the Act transferred a full and perfect title to Canada was at least the opinion of the Canadian Government and Legislature, and of the Government and Legislature of this Province, and also of the eminent statesmen and lawyers controlling and directing them, from the passing of the Confed-

eration Act in 1867, to the commencement of this suit in 1877. The Province of Nova Scotia, during this period, has made no claim for the revenue she ought to derive for the right of running powers which the plaintiffs have exercised continually since the completion of their road. The Dominion Government has at all times claimed and acted on that right, and the Dominion Parliament has repeatedly legislated upon that assumption. The defendants have undertaken immense expenditures on this understanding, and even the plaintiffs, after their road was finished, went, as they assert in their bill, not to the Provincial Government who made the contract, but to the Dominion Government, "who by due course of law became the sucessors of the Government of Nova Scotia," to obtain the running powers stipulated for in the agreement of 1866. They accepted from the Dominion Government a lease for twenty-one years of the road, with a clause for perpetual renewal, without making any provision for compensation to the Provincial Government for its reserved interest, and they have run the railway down to the day it was taken from them in 1877, under the Dominion Government as their landlord. Provided the legislation of 1874 has given title to the defendants, I cannot conceive of a more perfect case of estoppel of the plaintiffs as against the defendants' claim of title. This much, I think, is clear, that until this bill was filed, nobody ever doubted for a moment that the Dominion took a full and perfect title to this road under the British North America Act. At least such is my opinion.

The next question with which I have to deal is, whether this railway passed to the Dominion of Canada in such a manner as to make it a *quasi* territory of the Dominion, as did the public harbours, military roads and other public property of the provinces and of the Imperial Government; or, whether the right which the Dominion Government possessed in this railway under the Act was a mere civil right, held by the Dominion as it would be held by a private person, and entirely subject to the legislative jurisdiction of the Province of Nova Scotia. If the Dominion Government wished to make such an arrangement as purports to have been made by the Act of 1874, for the transference of this railway to the defendants' Company, should they have invoked the authority of the Parliament of Canada, or of the Legislature of Nova Scotia?

Now, this is a question in the consideration of which, in any view we may take of it, we will get very little assistance from our law books, because the circumstances are very peculiar,—so much so as to have seldom before come into discussion in courts of Justice. At least in my own reading, I have never met with any decision to throw light on such a question; and I have consulted the treatises on constitutional and international law within my reach in vain for some guidance in the consideration of it. In truth questions of this sort are usually settled by treaties between nations, or by the legislation of a supreme parliament as in the case of the British North America Act. It seems to me that this is not a question which can be argued solely on abstract principles of public policy, or upon any precedents founded on past judicial experience; but it is to a large extent a question of the construction of that act. In what manner and to what extent did the British North America Act transfer this railway to Canada?

The question divides itself into two parts; 1st, was there a *divided* legislative jurisdiction, partly in the Government of the Dominion, and partly in that of Nova Scotia?

It was contended at the argument, not only that the title of the Dominion Government was restricted by the agreement of 1866, but that, as a necessary consequence, the legislative jurisdiction was restricted to the same extent. I think the conclusion is sound if the premise is correct. If the British North America Act did not pass the whole title to Canada, it did not, I think, pass the whole legislative jurisdiction; and we are driven to the singular and most anomalous position of being asked to decide that the British North America Act intended to vest in the Canadian Government not only half a title, but a divided legislative jurisdiction,—that is, that the Dominion Government took under the act the restricted title, (I do not use the term "reversion," for at this time there was no reversion, as no lease had been made,) with exclusive legislative control over that restricted title vested in the Dominion Parliament, and, that the Provincial Government retained a title co-extensive with that restriction, over which title the Parliament of Nova Scotia was vested with exclusive legislative control. I think the contention of plaintiffs' coun-

sel leads us to this strange position. But is it credible that the British Parliament could have deliberately intended to create such a jumble of title and jurisdiction? Is it possible that in such a state of affairs a railway, or several connected railways of which this formed a part, could ever be worked successfully or safely? Is it possible that if such a state of the title and jurisdiction exists the most serious complications can be avoided, of which this suit is but the beginning? And is it possible that the Parliament could have intended to originate a series of legal complications, utterly incapable of solution by Her Majesty's Courts, which would be left without rudder or compass to guide them; for I am sure that no such case of divided title and jurisdiction has ever before come before a Court of Justice in any of the British Dominions.

If such a divided jurisdiction exists, it, of course, concludes the whole case; for the Act of 1874, ch. 16, was clearly beyond the jurisdiction of the Dominion Parliament, and the Parliament which had the power to legislate to the extent of the contract, (that is the Parliament of Nova Scotia) has not spoken. But unless some instance can be shewn of such a thing having ever happened before in the history of the world I do not think I have any need to argue it. The act confers, not a divided jurisdiction over certain interests, but an exclusive jurisdiction over the the railway in some one legislature.

2nd. This brings me to the second part of the question of legislative jurisdiction, which is of the very greatest importance, because it is, in my view, the controlling question in the cause, and because it involves the control, as I think, of the whole of the Nova Scotia and New Brunswick railways at the present time. Was it the intention of the Imperial Parliament to vest the exclusive legislative control of the Nova Scotia and New Brunswick railways in the Parliament of Canada, or in the legislatures of the two Provinces?

In order to solve this question, which was not raised at the argument, (for at the argument it was assumed by all parties that the legislative jurisdiction was commensurate with, and followed the title,) but which has since received very anxious and careful consideration from the Court, I think we must go first to the British North America Act itself. Sec. 92, s. s. 10 of the Act gives the Provincial Legislature exclusive power

over "local works and undertakings other than such as are of the following classes:—

"*(a)* Lines of steam, or other ships, *railways*, canals, telegraphs and other works and undertakings *connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province.*

"*(b)* Lines of steamships between the Province and any British or foreign country

"*(c)* Such works, as although wholly situate within the Province, are, before or after their execution, *declared by the Parliament of Canada to be for the general advantage of two or more of the Provinces.*"

The legislative jurisdiction over these three classes of excepted subjects is exclusively in the Dominion Legislature by sec. 91, s. s. 29. Does this railway come within either of these three classes of exceptions?

I pass by a possible question whether this railway comes within exception *(a)*, being part of a line of travel connected at that time with a Provincial railway between Halifax and Pictou, (which has subsequently become, by the Act of 1875, a part of the Intercolonial road,) and at the other with a line of steam communication connecting this Province with New Brunswick,—also within the same legislative jurisdiction under exception (*a*), not merely because it was not suggested at the argument, but because the facts necessary to enable us to form an opinion are not before us in this demurrer. I exclude this question, therefore, and consider that for the purpose of this decision, this railway does not come within either of the two first exceptions, *(a)* or (*b*).

But it may be argued that this railway comes within exception (*c*), because, not being included in (*a*) and (*b*), it has virtually been declared by the Parliament of Canada, under exception (*c*), to be of public advantage to the Dominion; and in support of this argument it may be pointed out that by chap. 22 of the acts of 1875, and by a subsequent act, certain other railways in New Brunswick and Nova Scotia are declared to be parts of the Intercolonial railway, and included in its general management, under the control of the Minister of Public Works. It will be observed by reference to the Act, that it includes not only those parts of the Nova Scotian and

New Brunswick railways which form part of the direct track of the Intercolonial, *i. e.*, from the River St. Lawrence to Halifax; but the whole lines from Halifax to Pictou, from Truro to Painsec Junction, from St. John to Shediac, and from Moncton to the St. Lawrence, thus including all the railways in Nova Scotia and New Brunswick belonging to the two Provinces. It does not appear that any *express* legislation was had under exception (*c*) to give legislative jurisdiction to the Dominion of Canada over any of these railways.

Had the fact been that all these railways were declared to be of general advantage to the Dominion, and the Windsor branch omitted, this fact would have much, but not conclusive weight. It might fairly have been argued that the Parliament of Canada had, by implication, declared that these railways were of public advantage to the Dominion, but that the Windsor branch was not. But the Legislature of the Dominion had already declared in the previous year that the Windsor branch was of public advantage to the Dominion, by disposing of it to the Western Counties Railway Co. as a valuable consideration for their building another line of railway which was considered to be greatly for the public advantage. This is the most emphatic declaration the Legislature could possibly have given. It is true the act does not say in so many words—*i. e.*, in the words of exception (*c*)—that this railway was for "the general advantage of Canada;" but neither does the Act of 1875. Both acts *take it for granted* that the Legislature had jurisdiction, just as the Dominion and Provincial Governments had done, and as the plaintiff Company themselves had done, in accepting the agreement of 1871, which, by sec. 12 of the British North America Act, was expressly brought under the legislative jurisdiction of the Dominion Parliament, and not of the Parliament of Nova Scotia.

If all the parties concerned were in error on this point,—for it does not appear that they or anybody ever dreamed of anything else,—it was at least a very natural error. The first thing that would occur to them on hearing of a suggestion to the contrary would be the apparent anomaly of the Imperial Parliament giving to the Dominion a Legislature, and at the same time, and by the same act, several millions worth of rail-

ways, without giving the Parliament, directly and as a matter of course, a controlling power over all this valuable property.

I think they were fully justified in the conclusion upon which they all acted by the fair and just and reasonable construction of the British North America Act. Why did the British Parliament confer all these railways upon the Dominion? Why did the Dominion accept the trust? Why are the Provinces of Ontario, of Quebec, of Manitoba and Prince Edward Island taxed to pay the debentures representing the cost of these railways, if they are not for "the general benefit of Canada?" And if they were sold to-morrow, would not the price go into the treasury of the Dominion for "the general benefit of Canada?"

If this be a sound view as it appears to me to be a simple and common-sense view of the statute; then why should the Dominion Parliament gravely set itself to do over again what had already been done by the British Parliament? An act for that purpose would read as follows:—"Whereas, the British Parliament, for the general benefit of Canada, has given her certain railways; therefore, be it declared that those railways are 'for the general benefit of Canada.'" Such an act would be on its face a work of supererogation.

If this be the true meaning of the British North America Act, and the reasonable construction to be put upon it, then it is not at all wonderful that up to this day no act of the Dominion Legislature has been passed to declare that these railways were for the general benefit; but it would be a very remarkable fact that in repeated instances that Parliament has assumed that they were so by actual legislation respecting them. If this view is not sound, then the Act of 1874, chap. 16, is void, the power of legislation remains at this day in the Local Parliament; and the plaintiffs, instead of coming to us to repeal an act of the Dominion Parliament, should have assumed it to be void and inoperative, and gone to the Local Parliament for an act to vest the railway in them, or otherwise protect their rights. This would be a far more effectual remedy than any we could give.

The Act of 1875 was passed to complete the legislation of the previous years for taking the possession and management of the Intercolonial out of the hands of the Commissioners

who had been appointed for its construction, and vesting it in the Queen and her officer the Minister of Public Works. The Act of 1867, chap. 13, had established the road from Riviere du Loup to Truro, as the Intercolonial Railway and as a public work belonging to the Dominion, and had authorised the appointment of commissioners for its construction. The Act of 1874, chap. 15, repeals the section for the appointment of Commissioners, and vests the railway, (*i. e.*, from Truro to the St. Lawrence, which had been constructed by the Commissioners,) formally in Her Majesty under the control of the Minister of Works. The act of 1875, chap. 22, completed the legislation by aggregating all the other railways in the Lower Provinces belonging to the Dominion, including those not in the direct line between Quebec and Halifax, as parts of the Intercolonial, formally vesting them all, as had been done the previous year as to a part of them, in Her Majesty and under the control of the Minister of Public Works, and bringing them all under the provisions of the general Railway Act of the Dominion, of 1868, under which I believe they had been in fact managed since 1867 without express legislative sanction.

The Windsor branch was obviously not included in the legislation because it did not then belong to the Dominion, having been conveyed by the act of the previous year to the defendants. No other reason can be given for the exclusion of this road from this necessary legislation which did not equally apply to the road from Truro to Pictou and to the New Brunswick railways.

I consider the extension of this act to the other railways, not lying in the direct line of the Intercolonial, to amount to a legislative declaration, not that they *ought to be*, but that they *were*, by the operation of the British North America Act, under the legislative jurisdiction of the Parliament of Canada. Indeed the *property* of the Dominion under that act is expressly given, in the last clause of the preamble to the Act of 1875, as the foundation of or one of the reasons for the legislation. So also I consider the omission of the Windsor branch from this necessary legislation tantamount to, by implication, a legislative confirmation of the Act of 1874, chap. 16, by which this railway ceased to be the property of the Dominion.

It is true the Act of 1875, following the language of the Act of 1874, vests all the railways in formal words "in Her Majesty." It does not necessarily follow from these words that they were not previously so vested; but it may have been considered expedient to remove all doubt on this point in dealing with public works constructed in three different provinces, and under three different governments. But the meaning of these words, whether they were necessary or not, is essentially different from the words "for the general benefit of Canada," and I do not think they can possibly have been intended to be used in that sense, even if any such declaration were necessary. The railways the jurisdiction over which was reserved to the Provincial Government, were, in my opinion, private railways, such as those belonging to mining companies, the Nictaux and Annapolis road, and any others which do not cross the frontier. If there are any others, such as the roads eastwards from Pictou and westwards from Windsor, which, by reason of subventions from the Dominion or Provincial Governments to aid in their construction, their connexion with routes of travel, or for other considerations, ought to be under the control of the Parliament of Canada, they can be brought under that control by a declaratory act of the Dominion Parliament. I do not think this sub-section applies to any roads the title to which passed to the Dominion Government under the British North America Act; but, if it does, I consider it has been complied with by the actual legislative transfer of the whole title of the road to the defendants, provided the Act of 1874 is otherwise sufficient for that purpose, which is the next question I have to consider.

I shall not discuss at length the broad question of the extent of the powers of colonial parliaments—a branch of the law which is abundantly well settled. It is true the powers of the Dominion and colonial parliaments are restricted by the British North America Act, so far as to point out what subjects shall be within the jurisdiction of each respectively; but no legislation has been had, that I am aware of, to restrict the power of either over the subjects of jurisdiction confided to them. Over these they exercise "parliamentary" control, and in the act they are called "parliaments." In relation to the subject of their jurisdiction their powers are the same, and

as unlimited as the powers of the British Parliament itself, except that the latter has a controlling power and may repeal their acts. In stating the doctrine thus comprehensively, I am not aware that I am stating propositions in relation to which there is any difference of opinion. It is true something was thrown out at the argument about our legislatures being restricted in their powers by the British North America Act, as are the United States Congress and state legislatures by the constitution of the United States; but no such argument was pressed upon us, and I think that it would not be a position which would be sustained by any British Court. I think also, in relation to this case, that there is no doubt on the mind of anybody that if the Act of 1874 is clear and express in its terms, and is susceptible of one and only one construction, we must hold that it is binding in that sense upon the parties to this suit,—that is, if I am right in my former conclusions.

In considering this third question as to the construction of the Act of 1874, I throw out entirely the subsequent agreement between the plaintiffs and the Minister of Public Works on behalf of the Crown, dated 20th June, 1875. Whether the making of that agreement was or was not an error, is a matter which we cannot take into consideration, in endeavoring to ascertain the construction of an act of parliament which had finally passed before the inception of the agreement. If the act was valid and effectual it must overrule the agreement in so far as there is any inconsistency between them; but surely I am right in holding that the agreement can have no effect whatever upon the previous statute, and ought not to form an element in considering the question of its construction.

I of course admit that "acts of parliament which interfere with the property or rights of parties for the benefit of others are to be construed more strictly than any other enactments." But is this such an enactment? Was it the scope and intention of the act to facilitate the carryin out of some private speculation? Such acts are frequently passed by the Legislature *ex gratia* for the benefit of private parties, and to promote undertakings in which the public have no immediate concern. They are called for this reason "private" acts, to distinguish them from those in which the public have large and important interests. I quite admit that any act of par-

liament of that nature, which takes away one man's property and gives it to another, must be construed with extreme strictness. But if an act of very great public importance is passed by the Legislature in order to promote a measure greatly for the public interests, and that act, if construed strictly, appears to interfere with private rights, I think the will of the Legislature must be upheld by the Court, and we must presume, as in this case I think we ought to presume, that, in passing the act, the Legislature intended to make ample compensation to the sufferers. Such a case occurred under the British North America Act. After the passing of the act it was established beyond doubt that this Province had not been justly treated in the financial arrangements, and the British Parliament, by an amending act, remedied the injustice and gave this Province out of the public funds of the Dominion a very large sum of money, in consideration of the injustice done to her by the act as it was originally passed.

I cannot consider this a private act or a local act. It appears to me not to be a private act for several reasons. First, it originated, as appears by the plaintiffs' bill, in a resolution of the House of Commons authorizing the Government to enter into negotiations with some reliable party for the transfer of the railway from Windsor to the trunk line, upon condition that such parties would extend the railway from Annapolis to Yarmouth. Surely the construction of that railway must have been a great and important public object, or the House of Commons would not have invited parties to enter upon its construction at all; still less would it have offered them as a subvention a public property worth probably one or two millions of dollars.

Why did the Province of Nova Scotia construct out of its own limited funds, as public works, the railways from Halifax to Windsor, Truro, and Pictou, and why did it grant the plaintiff Company a subvention of $40,000 per mile to aid them in the construction of their road, for which it was never intended the Province should get any return, except the public benefits conferred by the road? And why has the Dominion Government consented to transfer the Pictou branch to aid in the extension of the railways eastward to the Strait of Canso? These several vast public expenditures

were incurred in carrying out a wise and liberal public policy, to which I refer with pride; not at all for the benefit of any individuals, nor only for the benefit of the whole public of Nova Scotia, but for the benefit of every traveller from Europe, or the United States, or the adjoining colonies, who wished to traverse our country on business or pleasure. They were constructed to bind us to, and make us a part of the great world; not only to develope our own local resources, but that we might become partakers in a much larger degree than we could otherwise have been, of the commerce, of the intelligence, of the civilization of other lands. Does the fact that the Government, in carrying out this enlarged policy, had to deal with contractors to build these roads, render the acts authorizing their construction private acts? Neither are they local acts. Of course each railway passes through one or more counties; but they are connected with each other, and form together, when completed, a system of railway communication extending from end to end of the province, and connecting with numerous seaports and lines of steam-packets. Surely this cannot be classed with such a policy as the incorporation of a manufacturing company, or legislation authorizing the sale of a church.

The act is accompanied by two annexed schedules embodying two agreements, which, by its terms, are "*approved and declared to be as effectual to all intents and purposes, as if the said agreements had been entered into in pursuance of sufficient authority in that behalf given before the adoption of such agreements by Act of Parliament of Canada.*" I can put no other construction on these words than that they go as far as language can go to give those agreements the force and effect of an act of Parliament, and I consider every word contained in them to be as valid and effectual as if the schedules had been, as such, thrown aside, and their language embodied in the clauses of the act. Indeed this is avowedly the very object of the act. The form in which they appear, in my judgment, materially enhances their force, because the act recognizes them as embodying a previous arrangement, entered into by a Minister of the Crown, and approved by the Governor General in Council, and, therefore, free from the objection that might have been urged with some force, had

they merely appeared as clauses in the act, that the act must have been introduced in a surreptitious manner and passed *sub silentio*, without the Houses of Parliament being aware of its contents. I cannot understand the argument derived from the position of these agreements as schedules, unless it be inferred that the Parliament of Canada passed the act supposing the schedules to mean one thing when they expressly assert another and different meaning. If there be any force in this argument, it is surely obviated by the fact that the very things contracted for in the agreements and the whole substance of the agreements contained in the schedules are recited in express and explicit words in the preamble of the act itself.

In this connection I must remark that it is not alleged in the bill, nor is it at all probable, nor even possible, that the plaintiffs did not know of this bill being before the Parliament. Nor is it asserted that they did or did not oppose the bill in either house. If they did not, they have no right to complain of the act. If they did, and the bill passed on a fair hearing, we ought to have strong and clear reasons for repealing the act on equitable grounds, even if we had the power to do so.

I cannot say that I have heard it contended in the argument that this act of parliament does not at least *purport* to enact that this road should be given under the act to the defendant Company, with a perfect and absolute title, with immediate possession, and with an undivided usufructuary interest. It has been said that it does not purport to take away the rights of the plaintiff company and give them to the defendant company, and that, because it does not say so much, it is not to be adjudged that it was intended to do so. I cannot concur in this reasoning. I think that if an act of parliament in clear and express terms enacts that a certain property, accurately described, and stated to be in the possession of B., shall henceforth be and become the property of A., such act must operate without any intention being stated of depriving B. of his property; notwithstanding B. comes into Court and proves a clear and indubitable title; because it could not be given to one without being taken from the other. I do not think any English or American case has gone so far as

this. But in this case the Parliament, in the act, expressly refer to a report as accepted and approved by the Government, and which the act confirms, which report represented that the plaintiff company had forfeited their right. It is true the plaintiffs deny the truth of that representation in their bill, and we must assume it to have been untrue; but this assertion was officially before the parliament, and they believed it, and saw fit to act upon it, giving this as their reason. I think the act says; "The Windsor and Annapolis Company have forfeited their right, and therefore we take it from them, and give it to the Western Counties Railway." If they have said this, if they have not only given the property by express words to defendants, but given in express words their reason for doing so, I think we must uphold the act of Parliament, unless we are prepared to affirm, by the judgment of this Court, that we have not only a right to review an act of Parliament to ascertain its meaning,—this is of course conceded,—but that, having ascertained that meaning, and found that it is contained in clear and conclusive language, we have a right to repeal the act, because the reason given by the Parliament in the act itself for its enactment was founded on a misconception of the facts. That position has not been contended for in this argument; but it is my view of the question we have to decide, and, in my opinion, if we go that length we will go far beyond what has ever been decided in a British court of justice.

I ought to remark before closing that if the title and legislative jurisdiction of the Dominion were not restricted by the contract of 1866, I cannot at all imagine how it could have been so limited by the contract of 1871. In the former case the Dominion never could have had either a perfect title or full legislative jurisdiction; in the latter, the Governor General and his cabinet had certainly no power, by any act whatever, to limit the jurisdiction and powers actually vested in the Dominion Parliament. I am willing to admit that the Government had power even to grant a lease for twenty-one years, but not to destroy the constitution.

Section 12 of the British North America Act expressly makes all such acts subject to be abolished or altered by Parliament; but I think we need not resort to that section. We

would have a strange sort of British Constitution, indeed one not enumerated by Mr. Creasy in his treatise on British Constitutions, if the Governor General in Council could by any act control or limit the powers of Parliament.

My opinion on the demurrer is :—

1. That the British Parliament had power to pass, and by the British North America Act did pass to Canada a perfect and exclusive title in this railway.

2. That the British Parliament had power to pass and did pass by the British North America Act to the Dominion of Canada full legislative power over this railway.

3. That upon the proper and even the very strictest construction of the Act of the Parliament of Canada of 1874, ch. 16, that act effectually transferred to the defendant Company a present perfect usufructary right of possession, and a future full perfect and exclusive title.

4. That under that act the officers of the Government were justified in delivering possession, as they have done, to the defendant Company, and the defendant Company, in accepting the same.

5. I am therefore of opinion that the demurrer should be sustained.

I have carefully omitted all reference to any wrong that has been done, or any errors that have been comitted, or to the authors of that wrong or error, or to their motives; not only because the facts are not before us to enable us to judge accurately, but because, if they were, those are matters with which as a Court we have nothing whatever to do. Our duty is simply to administer the law upon the facts before us to the best of our capacity. It is enough for the losers in this controversy to know that if they are sufferers by the acts of the Government or Legislature of the Dominion they are certain to be indemnified; because the people of all parties have too much pride in their country and its institutions to permit private parties to be sufferers from the acts of their rulers. And I am glad that, in giving this opinion upon the law, I am able

to do so without being prejudiced by any fear that it will tend to do injustice to either of the parties so deeply interested.

As I have the misfortune to be alone in this opinion, I have the further satisfaction to know that, if I am mistaken in my conclusions, as I probably am, my error will do no harm, and, whether I am right or wrong, my views, though they may be peculiar, may perhaps be of some use in the discussion of the case on appeal. Certainly in a case presenting so many grave, important, and, I may add, novel public questions, some difference of opinion might reasonably have been anticipated.

DESBARRES and SMITH, J J., concurred in the opinion delivered by the Chief Justice.

RITCHIE, E. J., adhered to the opinions expressed in the judgment appealed from. *(Russell & Chesley's* Eq. &c., R., 287.)

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1878, TO APRIL 1879.

IN RE BEAMISH MURDOCH'S WILL.

TESTATOR made four wills, all in the year 1875, by the first of which, made April 6th, while residing at Halifax, at the house of his cousin, Charles Beamish, he left nearly half of his property to said Beamish, and the other half in trust for Mrs. H. A. N. Kaulback, in whose favor the fourth will, being the one in question, was made, to the exclusion of Beamish; on the 15th November, and while the testator was residing at the house owned and occupied by him in Lunenburg. The subscribing witnesses to the will both testified clearly to the testator's soundness and capacity. Two respectable witnesses beside Beamish, speaking as to September and the latter end of October, 1875, described the testator as being childish and imbecile, concurring in this opinion with the testator's nurse and her daughter, the evidence of the former of whom was not considered worthy of attention, for reasons appearing in the judgment. On the other hand, a number of intelligent witnesses, seven or eight, including testator's clergyman and physician who had visited him down to the time of the making of the will in dispute, and afterwards to the time of his death, testified strongly to his mental soundness and vigor. Testator had been on terms of great intimacy with Kaulback while at Lunenburg, where he lived from 1872 to the time of his death, spending the greater part of his time at Kaulback's house until it was destroyed by fire, after which Kaulback and his family lived with testator. Kaulback was his occasional banker and solicitor, and much evidence was tendered to show that he had immoderately supplied the testator with liquor. The draft of the will was in Kaulback's writing, but was sworn by him to have been copied exactly, at testator's request, from a will prepared by testator in August, with alterations suggested by the testator, and copied *verbatim*.

The will having been attacked on the grounds of senile *dementia* and undue influence,

Held, sustaining the decision of the Judge of Probate, that the will must be confirmed.

The Court was equally divided upon the question of costs, YORSTON, C. J. and DESBARRES, J., considering that each party should pay his own costs, SMITH and JAMES, J J., that they should be paid out of the estate. No order was made as to costs.

THIS cause came before the Court on an appeal from the decree of the Judge of Probate at Lunenburg affirming the Testator's last will. The cause coming on for argument, a volume of evidence was produced covering over three hundred pages of printed matter, and the Court, finding that several days must be consumed in the reading of the evidence alone, suggested that the counsel should hand in written arguments and allow the matter to be considered during the vacation.

The following were the grounds of appeal from the decree of the Judge of Probate:—

1. Because the decree is against law and evidence.

2. On the ground of the improper reception and rejection of evidence by the Worshipful Judge.

3. On the ground of undue influence by those supporting the will.

4. On the ground of undue and improper influence by H. A. N. Kaulback in obtaining the will.

5. On the ground of undue and improper influence used by H. A. N. Kaulback and his wife and family.

6. Because the testator was not at the time of making the last will of a sound and disposing mind and memory.

7. Because deceased was not, in relation to his cousin Charles Beamish and his daughter, and the other petitioner and his aged nurse, to whom he had shortly previous bequeathed a portion of his property, of a free and disposing mind and capacity and of a sound and unbiassed judgment and understanding.

8. Because the said testator was not aware of the effect of the terms of said will, as became evident shortly after the execution thereof, by his own declaration in evidence, and the same cannot be regarded as the deliberately formed and intelligent purpose of deceased.

9. Because those who would support the will have not shewn that testator had the capacity to form, and did deliberately form an intelligent and unbiassed purpose of excluding the petitioners from the share in his property bequeathed to them in April, 1875.

10. Because the *onus* in this case was on those upholding the will.

11. Because the reasonable grounds for contesting the will admitted in the decree were supported and strengthened by the evidence, and were not removed by those upholding the will, as required by law.

12. Because, owing to the relation existing between testator and his guardian, solicitor and attorney, the respondent, Kaulback, was not in a position to draw, direct or promote the revoking of the will bequeathing property to petitioners.

13. Because the conduct of the Honorable Henry A. N. Kaulback, in his relations to the testator, in supplying him with ardent spirits, in taking possession of his letters, in removing his nurse without consulting his friends and relatives, in secretly promoting the change in the former disposition of property to petitioners and testator's aged nurse, after notice that such change would be contested, was fraudulent and deliberately designed to obtain possession of testator's property, and his explanation of such conduct is evasive, unsatisfactory and obviously false in view of the other evidence adduced.

14. Because the evidence shows—

(1) That deceased, a retired barrister of the Supreme Court, was old and infirm, and in a very declining state of health, partially blind and addicted to the use of ardent spirits, and was in this state, by his own consent and the desire of his cousin Charles Beamish, under the care and attention of a nurse, engaged to watch over and attend him in his declining years.

(2) That while under such care the respondent, Hon. Henry A. N. Kaulback, also a barrister of the Supreme Court, continuously supplied him with an inordinate quantity of ardent spirits, namely two gallons of rye whiskey per week.

(3) That deceased had contracted from senile and mental disorder, a diseased, insane and uncontrollable passion towards the wife of said Kaulback.

(4) That deceased had no confidence in the integrity of said Kaulback, but the latter had acquired a dominion and influence over deceased by taking advantage of his condition and said circumstances, and supplying him with the means of further weakening his mind and body.

(5) That deceased placed his affairs in the hands of said Kaulback with a statement of the same, and said Kaulback stood to him in the relation of adviser, and acted, in fact, as his legal attorney and solicitor and business agent and guardian.

(6) That deceased was treated by said Kaulback as, (and as the fact was,) incapable of managing his own affairs, and said Kaulback, while acting in such capacity, exercised decided

and positive acts of influence and control over, and became seized permanently of the possession and control of the person and estate of testator.

(7) That under the above circumstances and said relations existing in the fall of 1875, Charles Beamish, the cousin and friend of deceased, (deceased having in the previous month of April made said Beamish his sole executor, with bequests to Beamish and his relatives,) warned said Kaulback against improperly inducing said deceased to alter this will.

(8) That said deceased had frequent attacks of illness during the summer of 1875, and a most severe, prostrating and violent attack in the beginning of November, which ended shortly afterwards in paralysis of the brain; that, during said severe illness, said Kaulback, who had been privy to the making of numerous wills by testator subsequent to April, and notwithstanding the notice of said Beamish, and said Kaulback still sustaining said above relation to said testator, without the intervention of an independent solicitor or adviser, and while said testator was laboring under said senile and diseased passion towards the wife of said Kaulback, and being at the time under a mental delusion as to the said Charles Beamish, prepared the draft of the will in question, giving the whole of his property to said Kaulback and his family, and revoking the bequests to said Charles Beamish and his daughter, and the other petitioner and the said nurse, and procured the same to be engrossed and executed.

The appellants, in their written argument, presented by *Weatherbe, Q. C.*, relied upon the following propositions:—

1. That the deceased was old and infirm, in a very declining and ill state of health, partially blind and addicted to the use of ardent spirits.

2. That while under the care and attention of a nurse who was engaged to attend him in his declining years, the Respondent, H. A. N. Kaulback, supplied him with an inordinate quantity of alcoholic liquor, which was continued till after the date of the will.

3. That deceased contracted from severe physical and mental disorder a diseased and insane passion for the wife of the Respondent.

4. That said Kaulback acquired an influence over deceased, and deceased having placed a statement of his affairs in his, Kaulback's, hands, Kaulback stood to him in the position of business adviser, and acted in fact as his attorney and solicitor.

5. That deceased was treated by Kaulback as, (and as was the fact,) incapable of managing his own affairs, and there were decided acts of undue influence, and the actual taking possession by Kaulback of testator's house and property.

6. That under these circumstances and these relations existing between the parties in November, 1875, the will in question, several other wills having by Kaulback's assistance been made, was promoted by Kaulback, and deceased was induced, while suffering from an excessive fit of illness, without the intervention of an independent solicitor or adviser, to bequeath the whole of his property to Kaulback and his family, strangers, thereby revoking bequests of $5000 made previously in Halifax, 6th April, 1875, voluntarily by himself with his own hand, to use his own language, "to his best and tried friend and cousin, Charles Beamish," to the daughter of Mr. Beamish and to his sister-in-law, and also a bequest of $200 to the widow Peck "for her attention to him in severe illness."

7. That there was no ground or reason in fact for the change, but there was evidence that deceased was laboring under the idea that Charles Beamish had done him some wrong, which could only have been promoted by Kaulback and his family.

8. That from the state of mind of the deceased when the will was executed, he was not really aware of the effect of the will of November, or of the will at all,—shortly after making a declaration ratifying the will of April.

Petitioners contended that these propositions were amply supported by the evidence, and that there was little or no conflicting evidence whatever. Lunacy, idiocy or insanity in the general sense was not urged and was not, as petitioners contended, necessary to be maintained. The petitioners' counsel then referred in detail to the evidence in support of the propositions above set forth, and contended that in this case the *onus* of proof lay heavily upon the party benefited to maintain the validity of the will, citing *Ashwell* v. *Lomi*, L. R., 2

P. & D., 477, in which case there was an entire absence of the course of conduct and numerous acts proved against the respondent here. The plaintiff in the case cited was the medical attendant of the testatrix, and a man of irreproachable character; and the only ground on which the Court decided that the *onus* lay on him was that the will was secret. In this case the Judge below placed the burden on petitioners, and that ground alone was sufficient, in the opinion of petitioners' counsel, to reverse his decision. In the case of *Ashwell* v. *Lomi*, just cited, the Court,—so petitioners counsel contended,—would not have upheld the will if there had been a single act of undue influence, and if a solicitor had not been called in at the last; and, even then, they refused costs to the plaintiff.

Petitioners contended, finally, that the examination of one of the witnesses had been prevented by the conduct of Owen, who was respondent's counsel, and numerous improper suggestions had been made by said owen during the cross-examination of witnesses, of so marked a character as to have seriously prevented the course of justice.

The learned counsel referred to the admission of petitioners that insanity or *dementia* generally was not insisted on. To guard, however, against any credit the Court might give to Kaulback's evidence in relation to alleged declarations of Murdoch, the testator, of a change of affection for Mr. Beamish and those for whom he had provided by the will of April, counsel submitted that if such ideas were entertained by the testator, they afforded evidence of delusion or partial insanity. Authorities were submitted on this head, and also to support the contention of petitioners that the testator, in giving the bulk of his property to Mrs. Kaulback, was influenced by a diseased and distempered imagination, amounting to impaired and unsound understanding as regarded this woman. And no doubt was entertained by counsel that it might be fairly urged, (although that was not the question before the Court) that even the bequests to Mrs. Kaulback and her children in the April will, were, as respected the motives and influences working in the mind of the testator towards her, made in consequence of a perverted and impaired operation of the mind, induced by inordinate and diseased passion which dis-

abled the testator from thinking and acting with the necessary freedom to dispose of his property.

The following authorities were cited in support of the petitioners' contentions; *Taylor's Medical Jurisprudence*, 6th Am. Ed., 631; *Drew* v. *Clarke*, 3 Adams' Ecclesiastical Reports, part I., p. 79; *33 N. Y. Reports*, 640; *Stanton* v. *Weatherwax*, 16 Barbour, 25; *Wharton & Stiller's Medical Jurisprudence*, 17; *Eustly* v. *Foster*, Law Times for 1877, p. 239; *Clarke* v. *Fisher*, 1 Paige, 171; *Crispell* v. *Dubois*, 4 Barb., 393; *Lee* v. *Dill*, 11 Abb. B. P. Pr., 214; *Layoraft* v. *Simmons*, 3 Brad., 35; *2 Moore*, 481; *Court of Appeals*, 6 N. Y., 286; *Gibson* v. *Jeyes*, 6 Ves., 266; *Welles* v. *Middleton*, 4 Bro. P. C., 245; *Huguenin* v. *Basely*, 14 Ves., 273; *Dent* v. *Bennett*, 4 My. & C., 269; *Montesquieu* v. *Sandys*, 18 Ves., 302; *Cooke* v. *Lamotte*, 15 Beav., 234; *Bridgman* v. *Green*, 2 Ves. Sr., 627; *Wilson*, 58; *Newman* v. *Payne*, 2 Ves. Sr., 199; *Hutch* v. *Hutch*, 9 Ves., 292; *Hylton* v. *Hylton*, 2 Ves. Sr., 547; *Billage* v. *Southey*, 9 Hare, 534; *Harris* v. *Tremenheere*, 15 Ves., 34; *Hinsin* v. *Weatherall*, 23 Eng. L. & Eq., 132; *Archer* v. *Hudson*, 7 Beav., 551.

The written argument contra was presented by *McCoy*, *Q. C.*

Respondents' counsel took a preliminary objection that the grounds of appeal differed from those taken before the Judge below, which were, first, that the testator was not of sound and disposing mind; secondly, that there was undue influence by Mr. Kaulback, (alone); thirdly, that the testator was of a weak understanding at the time the will was made, produced by undue influence, bodily infirmity, and the use of ardent spirits; whereas the grounds of appeal were fourteen in number, to the last of which there were eight sub-grounds. *R. S.*, cap. 90, sec. 77. He contended further that the grounds were not stated with sufficient explicitness. *Brown's Prob. Prac.*, 283, 284; *30 L. J., P. M. & A.*, 168; *2 Sw. & Tr.*, 504.

The learned counsel then entered into an elaborate review of the evidence, and concluded with his brief of cases, the leading points of his argument being as follows:—

As to the 9th, 10th and 11th grounds of appeal, he contended that the mere fact of a will being drawn by the person most benefited by its provisions did not render the will void.

If the person benefited propounded the will, he must bring forward such evidence as to entirely satisfy the mind of the Court that the testator knew and approved of the contents of the will. *Mitchell* v. *Thomas*, 6 Moore's P. C., 137; per DRAPER, C. J., in *Martin* v. *Martin*, 15 Grant; *Barry* v. *Butlin*, 2 Moore's P. C., 480; (Observations of PARKE, B.).

As to the 12th ground, he contended that the circumstance of a solicitor preparing for his client a will containing dispositions in his own favor did not prevent him from taking the benefit if no undue influence was used, citing *Hudson* v. *Wetherall*, 1 Sim. & S., 609; *5 DeG. M. & G.*, 301, in which a gift by will by a client to his solicitor in gratitude for services rendered by the latter, of certain real estate and the sum of £1000, the will having been drawn by the solicitor, was sustained by the Court. The following cases were also relied on; *Walker* v. *Smith*, 29 Beav., 394; *3 Moore's P. C.*, 136; *Waters* v. *Thom*, 22 Beav., 547; *Haddock* v. *Trotman*, *1 F. & F.*, 31, where the will contained a devise in favor of the mother of the attorney who drew it, and was executed by the testratrix on her death-bed whilst she was in a state of great debility. Counsel relied strongly on the case of *Ashwell* v. *Lomi*, L. R., 2 P. & D., and the reasons given for supporting the will in that case were considered as peculiarly applicable to the present case. So also *Parfitt* v. *Lawless*, L. R., 2 P. & D., 462, which showed what was undue influence, and established some new doctrines in regard to it. *Hall* v. *Hall*, L. R., 1 P. & D., 482.

The fact of a testator retaining his mental capacity, (as it was admitted he did in this case), and living for a considerable period after the date of the will without altering or throwing doubt upon it, was relied upon as an important circumstance in favor of its validity. *Kelly* v. *Thewles*, 2 Ir. Eq. R., 510.

As to insane delusion, *Clark* v. *Fisher*, 1 Paige, 171, 172, and 12 Grant, 500, were relied on; as to the testator's old age, *1 F. & F.*, 584; as to the mind being affected towards third parties, *L. R., 3 P. & D.*, 64; and as to the effect of drunkenness, *13 M. & W.*, 623; *Handley* v. *Slacey*, 1 F. & F., 574; *Peck* v. *Carey*, 27 N. Y. R., 9; *Wheeler* v. *Alderson*, 3 Hagg, 602, 608; and particularly the remarks of Dr. LUSHINGTON, in *Dimes* v. *Dimes*, 10 Moore's P. C., 422, 426.

As to the alleged undue influence, he contended that the influence, to vitiate the will, must amount to force and coercion, destroying the free agency of the testator, and there must be proof that the will was obtained by such coercion, *Williams* v. *Goude*, 1 Hagg. Ecc. R., 581; *L. R., 1 P. & D.*, 481; *Boyse* v. *Rossborough*, 6 H. L. C., 2; and this undue influence must be exercised as regards the will itself. *Walkem on Wills*, 144, 136.

As to the 5th ground, he contended that the names of the members of the family who exercised the influence should be given; and that the grounds of undue influence, intimidation, duress and improper control were bad, unless the names of the persons who exercised such undue influence were specified; citing *Harris* v. *Bradbury*, 30 L. J., P. M. & A., 168, and *West* v. *West*, 34 L. J., P. M. & A., 146.

Sir William Young, C. J., now, (December 10th, 1878,) delivered the judgment of the Court:—

This appeal from the judgment of the Court of Probate at Lunenburg, affirming the Testator's last will, came before this Court for argument, when, the minutes of evidence having been read for an hour, it was found that it would take three days to go through them, and thereupon it was agreed that the counsel should send in their respective briefs, and that the whole case should be considered in vacation. This has been done and I have now to pronounce decision.

The Testator died in February, 1876, having made four wills in 1875; the first while he was residing at Mr. Charles Beamish's in Halifax, on the 7th April; the second on the 21st, and the third, correcting some mistakes, on the 27th August; and the fourth, now in dispute, on the 15th of November. It is material to consider the first will for two reasons; first, because Beamish states that Testator's mind appeared at that time to be perfectly clear, and secondly, because, with legacies of $3000 to Beamish, whom he calls his best and tried friend, of $1000 to his daughter, of $1000 to his sister-in-law who was no relation, but was at the time an object of his affection, and $200 to Peck, his house-keeper while at Lunenburg for her attention to him in severe illness, he bequeaths $4,500 in trust for Mrs. Kaulback to her separate

use for life, to be divided at her death among her children then living. These sums exhausted his whole estate, or went somewhat beyond it. As the will of 15th November contains none of these legacies, and gives the whole estate to the Kaulback family, it is plain, if it be upheld, that an entire change had taken place in his regard for the Beamishes, of which indeed there is abundant evidence on the minutes to be hereafter noted.

The will of November is attacked upon two principal grounds; the incapacity of the Testator from weakness of body and mind, from senile *dementia*, as it is called, to understand and execute a will, and, secondly, delusion, an insane attachment and desire for Mrs. Kaulback, the exercise of undue influence on the part of the Kaulbacks, and the excessive supply of intoxicating liquors with that view. These, I need not say, are very serious charges, and we shall find the evidence upon them in the last degree contradictory and irreconcilable. I shall not pretend to go through this evidence in detail, but shall review its leading features, marking the lines from which I derive it in the margin of my opinion. First of all, let us look at the execution of the will as proved by Mr. Solomon, County Surveyor and Treasurer, and Mr. Wentzell, a J. P., who had been in the habit for some years of drawing and witnessing wills. These two are the subscribing witnesses. Solomon says; "on the 14th November, testator handed to me the draft of the will." The witness copied it with alterations suggested by testator, and read it to him clause by clause, embracing the alterations. He took it home and engrossed it. It was executed next day and the witness says, "I swear testator's mind was calm, rational and clear. Mr. Wentzell and I left the house together. Testator at that time appeared to be calm, pleasant and self-possessed, and in fact was so."

Wentzell says, "at the execution testator overhauled the will as if he read it until he was to the end,—I think from 15 to 18 minutes. He put his finger along every line or the greater part as he went along. He said he was very thankful, because his eye-sight was very good that morning, better than for some time. It was a fine day. When he had finished reading it, Mr. Kaulback, (Senator,) came in. The latter said, 'I

understand you are about making Mr. Murdoch's will,' and further said, 'you had better read it to Mr. Murdoch,' which was done. As it was read clause by clause, Mr. M. responded 'that's right.' He then signed it, putting his thumb to the seal, only the two witnesses and himself being present, and the witnesses signed it." Wentzell says, "Mr. M. was of sound mind and fully capable of making a will. I have not the least doubt of it."

The execution of the will is not assailed, and I need scarcely say that the above evidence is very material and, independently of the general principle, raises a legal presumption that a testator so executing a will knew its contents, and that it conformed to his intentions; *1 Redfield on Wills*, 537.

Pursuing the same course as the evidence, I shall now review it as it bears on the alleged incapacity of the testator. The material witnesses on this point are Outram, Tobin, Beamish and the two Pecks.

Outram, a Halifax merchant, had known Mr. Murdoch for twenty years and saw him in September, 1875. He says, "I found a great change in him from the last time I saw him. I handed him a letter from my father. I was greatly shocked at his appearance, he had changed so much. He seemed to be quite imbecile; did not know me." "I handed him the letter; he handed it back to me and asked me to read it to him,—said he couldn't see. I read it to him and he did not seem to take any interest in it at all and made no comment upon it; his mind seemed to me to be gone."

E. J. Tobin, now deceased, had known Mr. M. from early childhood, and been on intimate terms with him for eight years;—saw him in the end of October, 1875; always considered him a remarkably clever man. He says; "I confess I was very much shocked to see the poor old man. I was shocked at his appearance; he did not appear to recognize me at first or to be able to keep up any connected conversation. The state of his body shocked me more than anything else,—he was always neat and natty in appearance previously, but when he sat down I noticed that his face was unwashed, hair unbrushed and nails dirty. That was my impression at the time. He was very feeble; I noticed it by his taking

hold of pieces of furniture and steadying himself till he got to his chair. He took a pipe and lit it; he tried to keep it going. He was slobbered all over with spittle and looked very disgusting, so much so that I thought Mr. Beamish and Mr. Aikins had better take out letters of guardianship and look after him. I thought he was not able to take care of himself." In a further answer the witness says, "I don't think he could write; he was nearly blind, and he had given up reading; he couldn't see a letter; I watched him very closely."

The evidence of these two witnesses I have given at large. They were intelligent and reliable and, apparently, disinterested,—intimate friends, it is true, of Mr. Beamish, but incapable, one would think, of having their judgments warped in any way. We shall see, then, with some surprise, how utterly they are at variance with the other witnesses adduced by the respondents.

The evidence of Mr. Beamish I shall refrain from citing in detail. It covers many printed pages, and, on the point we are now considering, is very decided. He says; "I observed a change in the mind of Mr. M. after April; he was very feeble and could hardly walk; he told me his hearing was getting bad; his eyesight was getting bad, and he was feeble both in mind and body." "In September I don't think he was capable of making a will; he appeared to me to be perfectly simple as a child. I could compare him to nothing else but a child in his whole appearance and manner; he appeared to be dull, heavy and silly; it left an impression on my mind that his mind was not sane. From September down to his death, he was not, according to my judgment, in a fit state to understand or appreciate business matters. I asked Mr. Kaulback in October to allow me to have a private interview with Mr. M., (they were then living together,) which was granted. I never made a request of that kind which was not granted. Mr. M. was quite blind at that time, as he stated he could not see to read or write. I returned to Lunenburg in December and found Mr. M. in the same state as in October. I went over some business transactions with him; made a statement of account of rents, &c. It was signed 13th September, by Mr. M. and myself. I did not consider he was capable, and he was blind. The only remark he made was that he was satisfied with what I had done."

The evidence of Mrs. Peck, the nurse, also represents Mr. M. as very feeble and childish; his person as if you would wash a baby; afraid of ghosts; unable to find his things; mislaying his watch; losing his tools in the garden. But this evidence, for the reasons I shall hereafter give, is subject to great suspicion.

Peck, the daughter, says; "I heard Mr. Kaulback say in my presence that Mr. M. was childish and wasn't able to attend to his own business; that anyone could cheat him if they liked."

The evidence on the other side proceeds from the Rev. Messrs. Norwood, Ellis and Owen, from Dr. Jacobs, Messrs. Rose and Gaetz, Mr. C. E. Kaulback and Miss Petit. It offers a singular contrast to what we have just been hearing, and I shall extract from it a few of the most striking passages. Mr. Norwood speaks mainly of the month of June, 1875. He says; "I found Mr. M.'s conversation intelligent and his memory clear. The whole tone of his conversation and bearing indicated mental vigor." Mr. Ellis says; "Between the 1st of August and the time of his decease I visited him once or twice a month, on an average, as one of the ministers of the parish. The state of his mind was very clear; he certainly knew what he was about. I should never have dreamed of thinking him an insane man. On religious matters he held his views tenaciously. I always looked upon him as a man of very strong will and determination. He argued clearly and logically. I always found his memory good. During the whole time of my acquaintance with him I never knew him to be under the influence of or affected by whiskey or liquor. I considered him perfectly sane on the subject of religion and Christ, as sane a man as I ever met, but I did not consider his arguments sound." I cite Rev. Mr. Owen, here, as the remaining clergyman. He had made acquaintance with Mr. M. in 1872, and saw him frequently up to 1876. He says; "I never knew him to be intoxicated or under the influence of liquor. During my conversations with him I found his mind very clear. In fact, he seemed master of every subject we talked of. He was a man of extraordinary mind. I never detected any change in his mind or mental powers from the time I first

met him to that of his last illness. I never had any reason to believe, during all my visits and intercourse with Mr. M., that he was not capable of transacting business and thoroughly understanding the nature of the business in which he was engaged, except at the time of his illness in December, 1875. I never saw Mr. M. otherwise than very neat in dress and appearance. His memory was excellent with regard to history and his past political life. I saw no change in his memory."

Dr. Jacobs also knew Mr. M. from 1872 to 1876, and was his medical attendant. He says; "I was in the habit of visiting the house three or four times a week and socially in the evenings. Mr. Murdoch was very particular about his clothes and dress and about his cleanliness. When I first became acquainted with him in 1872 his mind was clear and sound. In November, 1875, his mind was as clear as when I first saw him in 1872. His mind on the 15th November was sound and clear. He was that day capable of understanding the business in which he was engaged. His memory with reference to dates, &c., was very good. I never found him childish, or knew him to be guilty of a childish act,—always to the contrary of that. I never saw him under the influence of liquor to my knowledge from 1872 to the time of his death. On the 18th November he told me he had made his will a few days ago, and went on relating what was in it. He went on to mention that he had cut off the Beamishes on account of their, especially Charles, annoying him so much, trying to get some property and some papers, and that he was so much annoyed that he cut them off to a farthing."

I shall extract a few passages more, illustrative of Mr. Murdoch's habits and appearance. Mr. Ross says that in Oct. 1875 his dress was clean and comfortable, and very suitable for a man of his years; his hands and face were as clean and nice as any gentleman's ought to have been, and he had a sane, clear mind. Being asked if he was firm or easily led, the witness answers,—"He was firm;—I never knew Mr. Kaulback in any way to endeavor to influence him. I never knew him to unduly influence Mr. M."

So Mr. Gaetz says; "I never thought of anything else but that he was of sound mind. His memory was very good, he seemed to trace things very far back.

Mr. C. E. Kaulback says, "I was in the habit of running in to see him in the summer and autumn of 1875." (That is at the the time Halifax visits were paid.) "He then displayed as much soundness of mind as before. He always attired himself neatly and clean. I never knew him to be in the slightest degree childish or to do a childish action. I never saw him under the influence of liquor. His mind seemed to be perfectly clear on every subject that he'd speak upon. His intellect and memory appeared to be as clear then and sharp at the time I last saw him as when I first made his acquaintance."

It appears, however, from Mr. M.'s letters that he was subject to fits of depression and of bodily weakness. Especially in his letter to Mr. Beamish, 29th November, 1875, written by Edna Kaulback at his dictation, these symptoms appear in a very marked degree, which it is difficult to understand. Still, I think we must come to the conclusion that so numerous and reliable concurrent statements coming from gentlemen of position, with the most ample opportunities of knowledge, and confirmed by other witnesses independent of Mr. Kaulback himself, constitute not only a weight of evidence, but an irresistible weight in support of Mr. M.'s capacity to comprehend, and his power to execute the will of 15th Nov., 1875. And if he had the intelligence and firmness imputed to him, he could not have been swayed by undue influence.

That he was warmly attached to the Kaulback family, is apparent from all his acts and his repeated declarations, and I cannot but think that it is doing injustice to his memory to infer from some rash or thoughtless expressions a criminal and insane desire, and a deliberate purpose to disturb the domestic peace of those whom he regarded as his best friends. These are proved, besides, only by the nurse, who never possessed but had forfeited his confidence; and whose intemperate habits are proved by many witnesses, and who, there is reason to believe, consumed the large quantities of whiskey too liberally supplied by Mr. Kaulback up to July, when they very properly ceased. It is impossible to believe, with

the testimony of so many witnesses, that two gallons of whiskey a week could have been used by Mr. M. himself, or by any one under his roof. This is one of the difficulties of the case,—and so also is Mr. Murdoch's sudden antipathy to the Beamishes. I shall not attempt to go through the large amount of evidence on that score. It reappears in at least a dozen passages. It does not display itself in the letters of the 22nd April to May 10th, and 24th June to 29th November, 1875, nor in Mr. M.'s assurance to Mr. Beamish that he had left him half his property. Yet, this antipathy and the grounds of it, slight as they appear, are too often testified to to be doubted. And if he was himself acting on his own convictions and impulses, the law gave him the right. A will, however capricious or harsh, cannot be set aside if it be the act of a volition free and untrammelled. We must recollect, too, that the Beamishes did not stand in the same relation to the testator as if they had been more closely connected. Assuming them to be cousins, as he himself repeatedly calls them, they have not the same claim in the eye of the law as if they had been brothers, nephews or nieces. Beamish and his daughters, for aught I know, may be his next of kin, which would be an argument in their favor.

The only point of any consequence that remains is the question of undue influence. All the English and American cases on this subject, up to the year 1869, which have been freely incorporated with the arguments sent in, are to be found in *Redfield on Wills*, 3rd edition, Vol. I, 507 to 536, especially at pages 518, 520 and 530. Two of the English cases I shall introduce here, and invite attention also to the cases of *Lovett* v. *Lovett* and *Swinfen* v. *Swinfen*, both in 1 Foster and Finlayson, 581 and 584,—the last a remarkable case of a will, sustained by a jury and upheld by the Court.

In the case *Stultz* v. *Schaeffle*, 18 Eng. L. & E. 576, decided in 1852, Dr. LUSHINGTON observed that on the question of undue influence very little was to be found in the books, or could be expected to be found. "Some *dicta*," he says, "we have; for instance, Sir John NICHOL, in the case of *Kingsside* v. *Harrison*, 2 Phillimore, 551, observed that importunity, in its correct legal interpretation, must be in such a degree as to take away from the testator free agency. The same question was dis-

cussed in *Williams* v. *Goude*, 1 Hagg., 577, and *Huddlestone* v. *Armstrong*, 1 Moore, P. C., 478. The testator must be a free agent, having the power, if he had the will, to do or not to do any given act.

In *Sefton* v. *Hopgood*. 1 F. & F., 578, CRESSWELL, J., directed the jury as to the law thus, in 1855: "It is not sufficient, in order to make a will, that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers call a disposing mind; he must be able to dispose of his property with understanding and reason. The subject of undue influence as to the procuring of wills has been a good deal discussed of late years, and I think that the law, as at present understood, has somewhat modified the earlier opinions on the subject. The influence to invalidate a will is not the influence of mere persuasion. It must be an influence depriving the party of his judgment and his free action; it must be such an influence as induces you to think that the will, when executed, is not the will he desires to execute; that he does not benefit the parties he would wish to benefit, and therefore that it is not his will.

Then comes the case of *Boyse* v. *Rossborough*, in 1857, 6 H. of L. cases, 43, where the Lord Chancellor said:—

"If the person by whom a will is made, though it is good so far as relates to its execution and attestation, was not at the time it was made of sufficient mental capacity to enable him to dispose of his property, or if, having sufficient disposing mind, he executed it under coercion, or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations, in none of these cases can the instrument be properly described as being his will."

"One point is beyond dispute, and that is, that whenever it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed."

"The undue influence must be an influence exerted in relation to the will itself, not an influence in relation to other

matters or transactions. But this principle must not be carried too far." And then he proceeds to modify it by a case which he puts, not applying to the present.

In 1859, in *Hall* v. *Hall*, L. R., 1 P. & D., 482, SIR J. P. WILDE directed the jury in these terms; "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like;—these are all legitimate and may be fairly pressed on a testator. On the other hand pressure of whatever character, whether acting on the fears or the hopes, if so exercised as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will ever can be made. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

Applying this last observation to the case in hand, I would remark that the circumstance of Mr. Kaulback having acted as the attorney or solicitor of Mr. Murdock in a case having no connection with the will, appears to us of very little consequence; and that the fact, naturally leading to suspicion, of the draft of the will of 15th November, having been in Mr. Kaulback's handwriting, is accounted for in his evidence where he says, referring to the will of 21st August, which was undoubtedly the testator's; "the first remembrance I have with regard to that will was about the first of November. Mr. Murdoch had it then lying on the table in his library, with erasures and alterations, and he asked me to copy it. These interlineations and erasures were in his own handwriting. I followed exactly the paper as altered and amended. I sat down at a desk and Mr. Murdoch alongside when I copied it. He added to it verbally, which I followed verbatim as he gave it to me. In several parts of it he stopped me and added to it, I writing down his words." "After I had finished the copy, he asked me to read it over to him and I read it. He then requested me to engross it. He assented to it that it was correct. I declined to engross it and gave my reasons for it."

With this definition before us coming from a master mind, what are we to say to the general purport and scope of the

evidence I have cited. It has swollen to a volume of nearly 2000 folios, but I am not aware that I have omitted any material fact. Mr. Kaulback's own testimony would greatly strengthen his case. He denies in the strongest terms the exercise of any influence whatever on the mind or dispositions of the testator. The draft of the will he wrote at the instance of Mr. Murdock with the alterations he suggested was founded on the will of Aug., 1875. There is no evidence of any deception or threat, of any coercion or criminal inducement held out, and we could not set aside the will of 15th Nov., on the ground of undue influence, without rejecting a vast body of evidence which no court can overlook. That of the Rev. Mr. Owen, of Dr. Jacobs and of the two subscribing witnesses, to say nothing of the others, it is impossible to disbelieve.

Still, the entire rejection of the Beamish family, the tone of the testator's letters, the sudden change of his affections and his purpose, and the evidence of Messrs. Outram & Tobin, materially induced and justified this extended inquiry, and, therefore, while dismissing the appeal, I am not disposed to mulct the appellants in costs, but would direct each party to bear his own.

DESBARRES, J.—I have read over the voluminous evidence taken in this case with a great deal of care and attention, and feel myself called upon, after full consideration, to express my concurrence in the judgment just delivered by the Chief Justice, being of opinion that, although at the time the testator executed this will the body may have been exceedingly weak, the mind was sound. I have known Mr. Murdoch, the testator, from early boyhood, and, from what I know of him, I do not think he was likely to be swayed or influenced by any person in the disposition of his property. It has been very properly said that we must be governed entirely by the evidence, and, looking at that alone, I do not see how we can come to any other conclusion than that arrived at by the learned Chief Justice, after weighing the evidence with all the care the case demanded at our hands There was certainly some ground to induce the parties claiming as devisees under a former will of Mr. Murdoch to institute the inquiry which has been made; but the evidence produced by them to invalidate his last will has, in my view, been out-

weighed by that brought in support of it, and it must, for that reason, be sustained. I think, however, that under the circumstances each party ought to bear his own costs.

MCDONALD, J., was not present at the argment.

SMITH, J.—Upon the same principles that have governed the Chief Justice in coming to his judgment, I feel constrained to concur. What we may know outside of the evidence on the record cannot influence us in coming to our decision, and, on looking at the evidence, as I have done, very carefully, I find the weight of it to be of such a character as to constrain me to concur in the judgment of the Chief Justice. But I dissent from both of the opinions that have been delivered on one point, in that I think the costs should be paid out of the estate.

JAMES, J., delivered the following oral judgment:—

I concur in the opinion expressed by my learned brother, SMITH, that though the judgment should be for the appellee, the costs, in the very remarkable circumstances of this case, should be paid out of the estate. I would have preferred delivering a written judgment, but the evidence is very voluminous and contradictory, and it was requisite that I should examine a large number of legal decisions bearing upon it. It was only at the last moment that, with considerable doubt and difficulty, I arrived at the conclusion that the will ought to be sustained, and I have not since had time to prepare a written opinion.

The positions I wish to establish are, that the case has come properly before us, that the appeal was not only justifiable but absolutely necessary, that the case required the investigation of the best legal minds of the province, which it had not previously had, and that, to have allowed the matter to rest on the investigation it received at Lunenburg, would have been most unsatisfactory,—I am sure, very much so to the learned Judge of Probate for that County, by whom the decree was given.

In order to establish these positions which, if they are sound, necessarily entitle the appellant to have the costs paid out of the estate, I must give a sketch, very incomplete of necessity, of some of the principal points of the evidence;

and, in so doing, I shall confine myself almost exclusively to the documents in proof and the evidence of Mr. Kaulback, the party in favor of whom and of his family the will was made; for the simple reason that he is better informed than any one else as to what took place between him and the deceased testator, because he is the party mainly interested in sustaining the will, and because the doubts I entertain as to its validity are more strongly sustained by his evidence than that of all the other witnesses together. He is, besides, not only a lawyer but a man of intelligence and position.

I shall not refer to the history of Mr. Murdoch previous to 1872, when he first went to reside at Lunenburg, further than to observe that it appears by the evidence that he was a literary man of intemperate habits, had never been married, and had resided during most or all of his previous life, in Halifax; his nearest relatives here being his cousin Charles Beamish and his brothers, and Mr. T. Aikins.

He went to reside in Lunenburg in 1872, being then at least seventy-two years of age. The witnesses differ considerably as to his apparent age, but 75 was the age placed on the lid of his coffin, and we have evidence, of which we can take judicial notice, that he was not of less age, inasmuch as he was admitted as an attorney of this Court, as appears by our records, in 1821. By law he could not be admitted until he was 21 years of age, so that he must have been born at least as early as 1800. He was a small, thin man, and not at all robust or of active habits.

When he went to Lunenburg, in 1872, after residing some time at a hotel, he purchased a house, in which he resided, from Mr. Kaulback, with whom and his family he was exceedingly intimate, while in Lunenburg. In the spring of 1874, owing apparently to some difference with Kaulback, he sold his house and removed to Halifax, but returned to Lunenburg after a few months, during which he was a good deal at the house of Mr. Beamish, the appellant. Indeed, there had been a very long and close intimacy between Murdoch and his cousin Beamish. On his return to Lunenburg he had an interview with Kaulback, and asked K. to take him into his house as a boarder. I give Mr. Kaulback's reply in his own words; "I remember two objections I raised; 1st, that he

had been an old bachelor so long that he might not care to conform to the rules of my house. In the next place, I said, it was beneath my dignity to take him as a boarder or lodger, and that parties might say that I got him there to get his property." So he resolved to go housekeeping, and Mr. Kaulback sold him another house.

This conversation took place on his return from Halifax, in the autumn of 1874, seven or eight months before the making of the first of the five wills of which we have any evidence. In that will he left Mr. Kaulback's family half of his property. This conversation contains the first mention we have in the evidence of any such idea as Murdoch's leaving any property to Mr. Kaulback; and it is noteworthy that the first suggestion came from Kaulback. It proves, at least, that such a possibility had occurred to his mind. As for that possibility being an objection to taking him as a boarder, it seems strange, (and the significance of this remark will presently appear,) that it did not occur to Kaulback, that if taking him to board for a pecuniary equivalent was open to that objection, his taking him to board at his table *gratis* would be much more so. Let us see from Mr. Kaulback's testimony what were the relations which immediately after subsisted between them and continued until shortly before his death. "From the time Mr. Murdoch came to Lunenburg, in 1872, up to the time I left for Ottawa, in 1874, he was constantly, I may say daily, at my house. He was often to breakfast, yet oftener to dinner, and was never absent from tea, unless from some particular reason; and he would generally give the reason for his absence. From the time he returned from Halifax, in autumn, 1874, up to the time of my fire, in 1875, he was more frequently to my house to breakfast and dinner even than he had been previously. In fact, he had the run of my house; he'd go from the parlor to the kitchen, up-stairs and into the garden frequently with Mrs. Kaulback. He'd go out weeding and superintending and pruning the plants sometimes. I think two-thirds of the time he was at my house, (that is of the time people are out of their beds.) He was in the habit of spending the evening at my house. Whenever Mrs. Kaulback or I drove out he was generally one of the party."

Mrs. Peck had said that she was in the habit of undressing him and putting him to bed, but Kaulback denies this in these terms; "I saw him more than half the time go to bed myself, and undress himself." So that Mr. Kaulback was in the habit some half or two-thirds of the time of seeing him home at night and in bed, as well as entertaining him through the day. His plate was regularly set for him at table, so that he was not only treated as a boarder, but was allowed privileges not usually accorded to boarders—and all this without any charge. This state of affairs is more than abundantly confirmed by Mr. Kaulback's children and servants, who were examined as witnesses.

But the kindness of Mr. Kaulback and his family to Mr. Murdoch did not end here. Mr. Kaulback was his banker, and lent him money from time to time as he required it, for which, and for the value of liquors imported on joint account, or supplied to Mr. Murdoch out of his cellar, Mr. Kaulback took his notes of hand, which, at the time of his death, he held to the amount of about $1,000, all incurred within eighteen months of his death. Mr. Kaulback once expressed surprise to Beamish as to what Murdoch, who had a net income of $600 a year, could do with all his money. If we could place implicit reliance on Mrs. Peck's evidence, which is open to suspicion from her ignorance and intemperate habits, we would have no difficulty in solving the mystery; but I do not consider it very material. Mr. Kaulback was also Mr. Murdoch's solicitor. He defended him in an action at law; he assisted him in making his arrangements with Beamish; he declined, it is true, to accept a general power of attorney, but he accepted the charge of a schedule of his securities and property, and took part, more or less, by advice and otherwise, in the preparation or execution of no less than four different wills, made by Murdoch between June and November, 1875. Murdoch had no other solicitor, and Mr. Kaulback undoubtedly filled that position in fact, though perhaps not for specific pecuniary reward. Mr. Kaulback also supplied Mr. Murdoch with the greater part of his liquors out of a cask which he imported for their joint use. It is undeniable, from the evidence of three witnesses, which is not contradicted by Mr. Kaulback, that he received from Mr. Kaulback's cellar

two gallons of whiskey per week, besides champagne, sherry and claret, the quantities of which are not given. Besides this Mr. Kaulback's evidence shows that he was sued for $54.60 for brandy procured by him from Mrs. Metzler, in the months of May, June and July, 1875, inclusive.

What became of this liquor? Some small portion of it, doubtless, was used in treating, very moderately, the two or three gentlemen who occasionally visited him; and there is reason to believe that Mrs. Peck used a part of it. But, making all allowance for these, it is clear that Murdoch drank at his own house at least two bottles of whiskey per day. The quantity seems amazing for a man of seventy-five and not at all robust. But our astonishment is increased when we consider that he was at Mr. Kaulback's house every day from the forenoon until bed-time, and often from the morning. He was there, Mr. Kaulback says, two-thirds of his waking time. Surely he did not carry his liquor to Kaulback's house to use it there. It is evident, I think, that he consumed this marvellous quantity at his own house, and it is not possible to believe that in the other two-thirds of his waking hours, when he was at Kaulback's, he did not continue to use that which was indispensible to keep him up to the standard of conversation and argument so fully and minutely described by Mr. Kaulback and other witnesses. It is evident that liquors were used freely in the house and given by Kaulback to his visitors. Mr. Murdoch was not excluded when others were partaking, and Mr. Kaulback certainly did not keep his closets locked or his decanters sealed against him. On the contrary, I think we may presume from the evidence that liquors, as well as everything else in the house, were at the disposal of Mr. Murdoch as freely as of Mr. Kaulback himself. He was habitually under the powerful stimulus of spirits. When otherwise he was as when seen at his house by Outram, Tobin and Beamish, and described by them, by Mrs. Peck and others, dejected, weak, tottering, dirty and imbecile. He must have used the liquor as DeQuincy used opium, to bring himself up to a standard of intelligence and mental activity; then, when he was fit to see company, he would receive a friend at home or go up to Kaulback's. It was in this condition that he was seen by the three clergymen who never

saw him intoxicated. Had they seen him when quite sober, they would have seen him as he was seen by the other equally reliable witnesses, who give so different a description and who, from their previous acquaintance with him, were better able to discern the effects upon his mind and body of such excessive indulgence. This is the only way I can reconcile the very conflicting testimony, and I think it is the true explanation.

That Murdoch was at his best when he had consumed a large quantity of ardent spirits is quite consistent with what we know of the biography of men eminent in philosophy, in oratory and in poetry. In the golden days of English parliamentary eloquence, the days of Pitt, Burke, Fox, Sheridan and Brougham, the most splendid efforts were made when the speakers were under the powerful influence of intoxicants But for brandy and opium we would not have had Childe Harold, and DeQuincy poured forth in rapid succession his brilliant literary fragments, wonderful alike for their learning and art; logic and pathos, when he was consuming enormous quantities of opium. The case under consideration—unusual indeed but by no means unprecedented—is quite inexplicable, unless we take into consideration the wonderful extent to which the human system may be trained to withstand the ordinary effects of intoxicants, the brilliancy of intellect which they produce when not partaken of beyond the point of artificial endurance produced by constant and acquired habit, and the terrible reaction, producing dejection, despair, or idiocy, when the exciting cause is withdrawn or materially diminished. The former was his usual state when seen by strangers, the latter, when seen by Outram and Tobin.

It does not appear that Murdoch frequently exceeded the quantity necessary to stimulate him to the point of his highest mental activity. We have few instances given in the evidence of his indulging to the point of absolute drunkenness, nor does it appear that he was incited to drink to excess by Kaulback or his friends. On the contrary, the powerful influence which Kaulback had over him was exercised with good effect in preventing him from indulging to that excess.

This was the condition of affairs until Kaulback's house was burned in July, 1875. He and his family were then

invited by Murdoch to share his house, which they did until his death, in the following February. We know that during that time the house was supplied with liquor, imported for the joint use of Murdoch and Kaulback, and his habits appear to have continued the same until his decease. During the period while his habits were such as I have described,—that is between April and November, 1875, he made no less than five wills. He paid a visit to Halifax in April, 1875, and while there he prepared his will (No. 1), which appears to have been his own voluntary act; in which, in substance, he bequeathed half his property to Charles Beamish, the appellant, and the other half to Beamish, in trust for the separate use of Mrs. Kaulback and her family, constituting Beamish his sole executor and trustee, with full powers. In this will he calls Beamish "my best and tried friend, my cousin, Charles Beamish." There can be no doubt this will expressed the true state of his feelings at that time, and, so far as Beamish was aware at the time, his feelings continued the same during his life. We find in the evidence the letters from Murdoch to Beamish between the 22nd April and 29th November, the last being subsequent to the will in dispute, in all of which he addresses him as "your affectionate cousin," "ever affectionately yours," or words to that effect.

In these letters, which are eloquent and reliable witnesses in the cause, he speaks of his wretched health, which during that period seems to have been very indifferent and precarious, his business, his feelings; he entrusts to Beamish numerous kind offices, large and small, expresses repeatedly his great gratitude and confidence, and urgently invites him to visit him at Lunenburg, which he did on several occasions. Even after he had made the will in which Beamish's name was not mentioned he told him he had left him half his property, thus leading him to believe that his will of 6th April had not been changed. During one of these visits—in September—Beamish settled all his pecuniary transactions with Murdoch, to his satisfaction, and to the satisfaction of Kaulback, who assisted Murdoch, and who counted the money at Beamish's request,—as the latter did not consider Murdoch qualified to transact business,—so much so that he cautioned Kaulback against allowing him to make another will; though this is denied by Kaulback.

I have already stated that Murdoch made a will, (No. 1,) in Halifax in April, leaving one half to Beamish and the other to Mrs. Kaulback; shortly afterwards he returned to Lunenburg, leaving the Beamishes on the most friendly terms. His next will, (having been previously prepared, by whom, we are not told,) was executed at New Ross, in Lunenburg County, in June. He had gone there with Mrs. Kaulback and her family to a wedding. Mr. Kaulback was not present, but Murdoch had communicated to him a month previously that he intended to make an alteration in his will to the prejudice of the Beamishes. On his return from New Ross he handed it, sealed in an envelope, to Kaulback for safe keeping.

By this will, (No. 2,) Murdoch left, substantially, three-fourths of his property to the Kaulbacks and one-fourth to Beamish, still calling the latter his "trusty cousin" and naming Kaulback and Beamish as executors. This will was defaced by Kaulback's fire and required to be re-engrossed, which was done by Mr. Kaulback's clerk, under Kaulback's directions, at Murdoch's request, omitting a small legacy to his housekeeper, Mrs. Peck, which had been contained in the two former wills. This will, (No. 3,) was dated 21st August. Kaulback attended to its due execution.

A necessary clause having been omitted in the third will, it was re-engrossed and executed 27th August,—the two former wills, Nos. 2 and 3, being destroyed,—but a copy of the will No. 4 is annexed to the evidence, from which we can gather the contents of these three wills, (Nos 2, 3 and 4), which were substantially the same as far as regards Mr. Beamish. The fifth and last will was dated and executed on 15th November. It leaves his whole property to Kaulback and his family, omitting all motion of Beamish, and makes Kaulback and Mr. Owen his executors. The draft was in Mr. Kaulback's writing, and, beyond doubt, he interested himself actively in relation to its preparation and execution, as appears abundantly from the whole of his own evidence as well as from that of the subscribing witnesses.

Murdoch was intelligent at the time and, I have no doubt, fully understood what he was doing. The question now arises whether, upon the evidence as I have so far stated it, there is anything to invilidate this will, and I feel bound to

answer, after a careful examination of the cases, in the negative. *Handley* v. *Stacey*, 1 F. and F., 574; *Walkem on Wills*, 76, 77, 113 (i); *East* v. *Foster*, Law Times, 29th July, 1876, and *Boyse* v. *Rossborough*, 6 H. of L. Cas. 2; *Walkem*, 144 (l), 147, 155 (b) 156 (d) and cases cited; *Walkem*, 118 (4) (5). That Kaulback and his family exercised great influence over Murdoch is the necessary deduction from the evidence of all parties. That Kaulback boarded him *gratis*, supplied him with his liquors, was his banker and confidential adviser, and that he and his family provided him with the society he so much needed, is certain; and, as certainly, they exercised over him a corresponding and powerful influence. But all this, under the law, which is well settled, is no ground for setting aside the will. If they had gone further and solicited him to provide for them to the exclusion of his relatives, even that would not have been a sufficient cause. These are "influences," certainly, but not "undue influences." It would be an unfortunate circumstance for the sick, the aged, the imbecile and the desolate if they were deprived of the protection, the kindness and society so often, and most properly, rendered to them in the hope of a testamentary provision. Neither is the fact of Murdoch's intemperance any ground provided he was himself at the time of execution and knew, as I think he did know, clearly and intelligently, the effect of what he was doing. Had he, indeed, executed a will under the influence of either such an excess of stimulus as to produce actual drunkenness or of the reaction which must have followed a total cessation of the excitement, there might have been room to doubt; but I infer from the evidence that he was not in either of these conditions, but in his usual state of strong but intelligent excitement.

There is, however, one view of the case which has created very strong doubts on my mind.

I have already said that Kaulback had necessarily, under the circumstances, a very powerful influence over Murdoch. This abundantly appears throughout the evidence. If that influence was exerted to produce false impressions on his mind as to the conduct of those whom he had previously recognized as his nearest relations and best friends, with a few to induce him to disinherit them and substitute himself and his family

as legatees of his whole property, that would be an undue, because fraudulent, influence under the decided cases. I have already referred to the lifelong intimacy between Murdoch and Beamish, and his recognition of this in the most kindly manner in the correspondence extending from the time of his removal to Lunenburg, in 1874, down to a period subsequent to the execution of this last will.

But it is evident that from a period antecedent to the last will there was a hostile feeling growing up in his breast against Beamish and his relatives, well known to Kaulback, but concealed from them. This is perfectly evident, not only from the testimony of Kaulback, but it is clearly proved by Rev. Mr. Ellis, by Rev. Mr. Norwood and by Mr. Ross, and this feeling, coupled with the extreme kindness of Mr. Kaulback towards him, undoubtedly contributed to his utterly excluding Beamish from his testamentary beneficence. Now, it is singular to observe how often his grievences against Beamish formed the subject of conversation on this topic. By the statements of Kaulback it is evident that these fancied, for there were no real, grievances against Beamish formed a constant topic of conversation between them. In all of those which I have enumerated, Kaulback, who is the only living witness of what took place, tells us what Murdoch says, but no where does he tell us what he said himself in reply. He must have said something. But he neither admits, (with the exception I shall presently mention,) that he encouraged what he must have known to have been a delusion; nor does he say that he in any way discouraged it. In this very important particular the evidence is deficient. There was one occasion, however, on which he gives us briefly his share of conversation. Kaulback had, from instructions given him from Murdoch, which were not produced, having been, (I think unfortunately,) destroyed by Murdoch, prepared a draft of the will of 15th November. He says: "After I had finished the copy I had made from the paper he handed me, and from the suggestions he made to it *(sic)*, he asked me to read it over to him, and I read it. He then requested me to engross it. He assented to it that it was correct. I won't say it was just what he wanted. He approved of it, said it was right. I can't remember every word he said. *I declined to engross it.*

I told him that he knew well the conduct of Beamish and what Beamish had said to him, and it was right I should not have anything to do with making his will."

If this was a sample of what he said to Murdoch in his previous conversations; if, with the powerful influence he must have had over Murdoch from the circumstances I have mentioned, he was continually nursing an unfounded delusion in the mind of a man habitually excited with intoxicants,—if there were clear evidence to that effect, I could not sustain the will. Here we have Kaulback, at the very critical moment when he and Murdoch together where engaged in framing, by their joint efforts, a will to take from Beamish even the fourth part of his property which had been given to him by the three prior wills and give to Kaulback and his family the whole of the property, pointedly reminding him of his fancied grievances, as if in fear that Murdoch would forget them, and again change his mind. This circumstance, given to us by Mr. Kaulback himself, has affected my judgment so much that it is only with great doubt and hesitation that I have been enabled to sustain the will.

If I am justified by the evidence in entertaining these doubts, surely this was a proper case for a full discussion in this court. The parties could not, in such a case, have been expected to rest satisfied with the decision of a Judge of a County Probate Court, however venerable in years and honorable in reputation. More especially do the decided cases sustain the appellant's right to have the costs paid out of the estate when the doubts which exist, even if not well-founded, were created in the minds of his relatives by the conduct of the testator himself. I refer especially to the fact that by his letters and his declarations to his relatives, shortly before his death, he led them to believe that he had not altered his will in their favor made in April. In these circumstances I would have considered the counsel for appellant deficient in the performance of their duty to their client had they not appealed to this court; and, therefore, I cannot but think that the costs should be paid out of the estate.

I have ommitted reference to many minor but important points in the evidence which I could not introduce without largely increasing the prolixity of this opinion.

FORREST, ASSIGNEE, *v.* MUIR ET AL.

THE plaintiff, as assignee, proceeded by bill in equity to procure the cancellation of a conveyance made by the insolvent, charging that the conveyance had been made contrary to the provisions of the Insolvent Act of 1869, with intent to give an unjust preference to certain creditors, and fraudulently to impede, obstruct or delay the creditors in their remedies, and with the knowledge of the grantees, or reasonable cause on their part to know and believe that the grantor was unable to meet his engagements. The jury found that at the time of making the conveyance the grantor was in embarrassed circumstances and unable to meet his engagements; but they found that the grantees did not know and had not reasonable cause to know or believe that such inability existed, and they negatived any intent fraudulently to impede, obstruct or delay the creditors.

Held, affirming the judgment of the Equity Court, that, the jury having found as they had, on ample evidence, the conveyance could not be set aside under section 88 of the Act of 1869, and that plaintiff could not attack it under section 89, as having been made in contemplation of insolvency, as that was not charged in the bill.

THIS was an appeal from the decision of the learned Judge in Equity, reported in *Russell & Chesley's Eq., &c., Cases*, page 57, where the facts of the case are succinctly stated in the head-note, and expanded at length in the judgment of the Judge in Equity. The decree was in favor of the defendants, and the plaintiffs appealed. The argument of the appeal took place during last term of the Court before SIR WILLIAM YOUNG, C. J., RITCHIE, E. J., DESBARRES and SMITH, J J.

McDonald, Q. C., in support of the appeal.—The only defect alleged in this bill is that it does not set out that the mortgage was made in contemplation of insolvency. No allegation is needed in the writ that the insolvent knew of his insolvency when he made the mortgage, under section 133 of the Insolvent Act of 1869. The question is, does the writ set out facts sufficient to justify the conclusion that the insolvent violated the act? The writ sets out that A. F. Muir was insolvent and embarrassed in the summer of 1875. He could not have been embarrassed without knowing it.

RITCHIE, E. J.—The words, "in contemplation of insolvency," need not be used, certainly.

McDonald, Q. C.—The writ sets out the very provisions of section 89, that A. F. Muir made this conveyance with the intent to defraud his other creditors and give these defendants an unjust preference. It sets out also that Allan F. Muir knew of his insolvent circumstances. Another clause of the

writ states that A. F. Muir, knowing that he was insolvent when he made this conveyance, continued business. Here knowledge of insolvency on his part at the time of making the mortgage is sufficiently alleged.

Now, turning to the evidence, we enquire, was or was not that mortgage made by A. F. Muir because he knew he was insolvent, and with the view of securing these defendants. At that time he owed Forrest $16,000. His brother William was his endorser directly for his accommodation to the extent of at least $5,000 or $6,000, out of endorsements to the extent of $11,000. His paper was not being taken up as it fell due. He was warned by creditors, and by Hedley, the manager of the commercial agency, that the recording of this mortgage would be the ruin of his business. It is clear, therefore, that if his sisters were in the position of ordinary creditors, this mortgage must be set aside.

In *6 U. C., Pr. Rep.*, 325, will be found a case, *In re Hurst*, an insolvent, where HARRISON, C. J., of Ontario, in delivering judgment reviews all the cases under these sections of the act, and decisions under similar sections in the English act. See also *Bump on Fraudulent Conveyances*, 45-6-7, *Clarke on Insolvency*, 42-3-4.

An assignment of the whole property, valued at $60,000, to secure a debt of $10,000, is too large. The defendants, when they entered into possession, did not act as if they merely wished to obtain the amount of their debt. A transfer of all one's property is *prima facie*, fraudulent. *Roche & Hazlitt on Bankruptcy*, 376-7-8; *L. R., 7 Ch. Ap.*, 302 and 636.

There is no evidence here of a new advance, as a ground for this conveyance.

Now, the question remains, is this mortgage protected by the will of the late Robert T. Muir. After the death of R. T. Muir the brothers and sisters were credited on the books with the amounts of their legacies. The trustees were authorized to secure the legacies on the stock, but if they remained in the business, A. F. Muir was to pay the sisters $400 a year, or at the rate of ten per cent. on their legacy of $4,000, and six per cent. to the brothers. It is not to be supposed that, after the trustees declining to secure the legacy upon the

father's death, A. F. Muir was to pay this large amount yearly, exhausting the principal, and still be liable to have his stock transferred and his credit and business ruined at any subsequent time. The defendants must shew that they have done equity. By agreeing to accept the $400 a year, the sisters agreed to give up the principal and security. It is certainly not right or reasonable for the trustees to let the business go on for years, paying $400 a year to the sisters, and come in at any moment and ruin it.

The other side can only sustain this mortgage, on the principle that if a party obtains money on the promise of giving certain security, and does not give the security at the time, but does after he becomes embarrassed, the security will be sustained. But the defendants are not in that position; by leaving the money in the business they waived the claim to security. There cannot be a continuing security of the kind sought to be enforced here in personal property.

Meagher, contra.—Takes the objection that most of the points taken by the learned counsel in opening are not taken in the appeal. The Equity Procedure Act requires the grounds of appeal to be set out specifically; but the grounds set out here are in the most general terms. There was no evidence of the amounts paid to the sisters by A. F. Muir. The jury here was a good jury, qualified to deal with the issues submitted to them, and the issues were proper ones for them to deal with. *6 Best & Smith*, 314.

The will is a most important element here. A. F. Muir was one of the executors, and he made a bargain with himself as such, and with the other executors, to give this security. The settlement of R. T. Muir's estate was put off; the executors were advised that it was necessary to get the security of this mortgage before settling this estate, and they did so. The assignee is in no better position than A. F. Muir was.

Yates v. *Hoppe*, 9 C. B., 541, is a strong case to shew that where a conveyance is made in pursuance of a previous contract it is good as against other creditors. Cites *L. R., 20 Eq.*, 746; *L. R., 7 Ch.*, 24; *10 Bingh.*, 408.

Contemplation of insolvency is a fact; and it is a principle of equity pleading that every material fact must be alleged. This writ does not allege that the conveyance was made in

contemplation of insolvency, but simply that it was made with intent to defraud; and the jury have expressly negatived the charge of fraud. The book-keeper, who was examined, was not asked by the plaintiff's counsel, whether he believed A. F. Muir to be insolvent at the time of the mortgage. A. F. Muir himself said he believed himself to be solvent to a considerable extent. William and John Muir swear they believed his business would shew a balance of from $10,000 to $15,000. They knew what the statement for the previous year was.

As to the necessity of alleging contemplation of insolvency in the writ, cites *Story's Eq. Jurisp.*, sec. 28, and the case there cited; *3 Swanston*, 472; *Daniel's Ch. Pr.*, 326. Some of these authorities shew that evidence cannot be read, unless on allegations made in the bill or put in issue by the answer. *12 Moore's P. C. Cases*, 331; *13 Id.*, 198.

RITCHIE, E. J.—Suppose it said, being insolvent, and knowing he was insolvent, would not that be sufficient?

Meagher.—Forrest, when cross-examined, was compelled to acknowledge that at a time when A. F. Muir's notes were said to be lying over, there was in reality only one note lying over.

Hedley says A. F. Muir's liabilities under the will were taken into account in giving him his rating in the mercantile agency. A. F. Muir's condition of mind at the time of making the transfer is not to be judged from what has happened since.

Thompson follows.—As to the right of William Muir to secure his legacy under the will, the will expressly provides that that legacy and John Muir's should be secured next after the legacies of the sisters.

As to the debt from the estate to William Muir, of $500, included in this mortgage, the evidence is that the whole stock, all the assets in fact, of R. T. Muir's estate, were handed over to A. F. Muir, that is that he had all the assets out of which debts of R. T. Muir as well as legacies were to be paid.

YOUNG, C. J.—These trustees are not creditors. They are co executors.

Thompson.—The real creditors here are the two Miss Muirs; the knowledge in the trustees of A. F. Muir's embarrassment should not affect them. They are not parties con-

templated in section 88. There is no allegation in the bill that Allan Muir knew he was insolvent. It is only stated that he was embarrassed. A man may be in embarrassed circumstances and not be aware of his being insolvent. There is nothing inconsistent in a man being solvent and yet embarrassed. The evidence is that he was absent from his business a good deal of the time, owing to the state of his health, his business being carried on by the witness, Jost.

As to Hedley's declaration to A. F. Muir respecting the effect of the bill of sale upon his business, that declaration was excluded, because it referred only to the registration, and was made after the bill of sale was executed, and therefore after A. F. Muir had become a stranger to it. After the giving of the bill of sale William Muir did not reduce the amount of his accommodation endorsements. The will expressly contemplates the principal sum of the legacy to the sisters not being paid off by the payment of $400 a year, and contemplates the trustees taking security at any time. The allegation in the writ that the mortgage was made contrary to the statute is insufficient.

McDonald, Q. C., in reply.—Under the English statutes an act of bankruptcy is defined. This mortgage was such an act of bankruptcy, and is therefore void. The writ alleges that A. F. Muir, knowing he was insolvent, went on immediately after the mortgage selling the stock; the knowledge must then have commenced at least as long ago as the making of the mortgage. The cases cited only go to shew that you must have substantial allegations in the writ, to which you can, as Scotch lawyers say, "lead up the evidence."

Cites *McLeod* v. *Wright*, 4 Pugsley, 68.

DESBARRES, J., now, (December 10th, 1878,) delivered the judgment of the Court:—

The plaintiff in his writ alleges that Robert F. Muir, bookseller and stationer, now deceased, being at the time of his death possessed of a large stock, and there being a large amount of debts owing to him, in and by his last will, among other things, directed that his brother, Allan F. Muir, who is now insolvent, and of whose estate the plaintiff is assignee, should carry on the book-selling business which he bequeathed

to him, together with all the stock, debts, furniture and fixtures connected with it, on certain conditions; 1st, the payment or guaranteeing to the defendants, as trustees for his two sisters, Agnes and Euphemia Muir, $4,000 each, to be secured after his (testator's) death, if the trustees should see necessary by a first lien on the stock in the said business; or, if it should be found inconvenient to pay the said sum, the trustees were authorized to let the money remain in the business, Allan F. Muir paying to each of the sisters $400 during the life of each. The testator also gave to the defendants $2,000 each, to be paid by Allan F. Muir from the business at a convenient time after the testator's death, but which sum might also remain, upon payment of six per cent. interest per annum, to be secured second to the bequests to his sisters; that Allan F. Muir on the death of the testator took possession of the business, and the defendants allowed the $8,000 devised by him to his sisters to remain in the business, and also the $2,000 devised to the defendant William Muir, no security having been taken for either of these sums upon the stock of said business; that Allan F. Muir continued the business under the name of R. T. Muir & Co., and sold and disposed of the whole of the stock so bequeathed to him, and collected the debts and purchased and acquired new stock; that in the spring of 1875 Allan F. Muir became insolvent and in embarrassed circumstances, and unable to pay his debts in full, and, for the purpose of giving the defendants and Agnes and Euphemia Muir an unjust preference over his other creditors, and with intent to defraud his other creditors, and impede and delay them in their remedies, he, on or about the 5th of April, 1875, by an indenture of that date, fraudulently and illegally, and contrary to the provisions of the Insolvent Act of 1869, conveyed to the defendants, who then knew or had reasonable cause to know and believe that he, Allan F. Muir, was unable to meet his liabilities, all the stock in trade, goods, chattels and personal effects then belonging to him, upon the trust and conditions therein mentioned; viz., first, to hold the same as a lien and security for the payment to the said Agnes and Euphemia Muir of the said sum of $4,000 each, or an annual payment of $400 each in lieu thereof, as provided in the will of Robert T. Muir; second, to hold the same as a lien and security for

the payment of the sum of $2,000, and the annual interest thereof to William Muir, as provided for in said will; third, to hold the same as a lien and security for the sum of $549.79, and interest, being the amount due to William Muir from the estate of Robert T. Muir. The indenture contained a proviso that it should be of no effect in case Allan F. Muir should pay to Agnes and Euphemia Muir the said sum of $4000 each, and pay William Muir the said sum of $2,000, with interest, and pay him on demand the said sum of $549.79, with interest; and it was also provided that if default should be made by Allan F. Muir in these payments, or the defendants should become dissatisfied with that security, and he should neglect or refuse to furnish to their satisfaction other security in lieu thereof, after notice as therein specified, it should be lawful for the defendants to take possession of the property so conveyed to them, and to sell the same, and, out of the proceeds, to pay or secure the said amounts; that Allan F. Muir continued his business, knowing his insolvency, from the time of the assignment so made, till on or about the 15th June, 1875, when, with intent to defraud his creditors, and impede and prevent them in their remedies against him, he voluntarily gave up the whole of his stock, debts and assets to the defendants who have remained in possession, and have been and are disposing thereof; that as soon as defendants took possession of the stock, Allan F. Muir called a meeting of his creditors, and afterwards, on or about the 30th June, 1875, made an assignment under the provisions of the Insolvent Act of 1869, to the official assignee, and, on the 15th July, 1875, the plaintiff was duly appointed the assignee of his estate, who, on behalf of the executors of the estate, prayed that the indenture might be set aside and cancelled as fraudulent and void.

The defendants, in their answer, deny that prior to and at the time of the making of the indenture of assignment, they had any knowledge of the insolvency or embarrassment of Allan F. Muir, but believed the contrary to be the fact, and they deny that it was made to give Agnes and Euphemia Muir and the defendants an unjust preference over his other creditors, and with the intent to defraud them and impede and delay them in their remedies against him, and they say that

they had from time to time, after the death of Robert T. Muir, made inquiries into the condition of the business of Allan F. Muir from himself, and were led to believe that he was solvent and able to meet his engagements in full, and they deny that he voluntarily gave up to them the possession of his stock, but, on the contrary, say that they took possession in accordance with the terms of the assignment without his concurrence and proceeded to sell it for the purpose of paying and satisfying the amounts payable under its provisions with the intention of transfering any surplus that might remain to Allan F. Muir, or any other person lawfully entitled to it. The defendants also deny that the assignment was given fraudulently, illegally and contrary to the provisions of the Insolvent Act of 1869, and allege that Allan F. Muir gave it, as he was in duty bound to do, and that the defandants, in the discharge of their duty under the will of Robert T. Muir, demanded and took it *bona fide*, and without any fraud whatever on their part.

The issues arising in this case having been settled by the learned Judge in Equity and submitted to a jury, and that jury having drawn their conclusion from the evidence and expressed their opinion upon them, we are now, in the first place, to consider whether the jury were warranted upon the evidence produced before them in finding as they did, and, next, to say whether the decision of the learned judge, founded upon those findings, from which the plaintiff has appealed, can or cannot be upheld. The issues submitted to the jury, in the form of questions and their answers thereto, are as follows:—

1. *Q.* At the time the mortgage referred to in the plaintiff's will was made, was Allan F. Muir in embarrassed circumstances, and unable to meet his engagements?

A. Yes.

2. *Q.* Did the defendants, at the time of the execution of the said mortgage, know that Allan F. Muir was unable to meet his liabilities in full, or had they reasonable cause to know and believe that such inability existed?

A. No.

3. *Q.* Was the said mortgage made by Allan F. Muir with intent fraudulently to impede, obstruct or delay his

creditors in their remedies against him, or with intent to defraud his creditors?

A. No.

4. *Q.* Was it so made with the knowledge of the defendants?

A. No.

5. *Q.* Had Allan F. Muir sold and disposed of the whole or the greater part of the stock and collected the available debts bequeathed to him by R. T. Muir before the making and executing of the said mortgage?

A. Yes, with the exception of $16,000 worth of machinery.

6. *Q.* Did Allan F. Muir, with intent, fraudulently to impede, obstruct or delay his creditors in their remedies against him, voluntarily give up the whole of his stock, debts and assets to the defendant?

A. No.

7. *Q.* Was this so done with the knowledge of the defendants?

A. No.

In considering this case it must be borne in mind that this suit was brought with the view, and for the purpose of setting aside and cancelling the assignment made by Allan F. Muir to defendants of 5th April, 1875, as an assignment made in violation of section 88 of the Insolvent Act of 1869. To destroy the effect of and invalidate this assignment, there must not only be evidence to show that it was made by Allan F. Muir, with the intent to defraud his other creditors, and impede and delay them in their remedies against him, but it must also be shown that it was so made with the knowledge of the defendant. It is clear, from the answers given by the jury to the questions submitted to them, that, in their opinion, neither of these allegations was substantiated, and the learned judge, acting on the conclusions at which the jury arrived upon the evidence, gave judgment in favour of the defendants. Now, the various grounds on which this judgment is sought to be reversed are substantially set out and included in the first ground stated in the plaintiff's petition to the Equity Judge, for an appeal, viz.; that the judgment is against the evidence,

and, next, that the findings of the jury on the second, third, fourth, fifth and sixth issues were against the weight of evidence, and ought, for that reason, to have been set aside by the Equity Judge. I have carefully examined the whole of the evidence, and satisfied my mind that there is no ground to complain of or impugn the findings of the jury, which were entirely consistent with the testimony of the witnesses whom they have thought fit to believe and whose credibility it is not for us to question. Allan F. Muir, the insolvent, who was called on the part of the plaintiff, says; "when the bill of sale was executed I had no idea that I was insolvent, or likely to become so," and at another place he says; "the assignment to my brother was given with the view of winding up the estate under the will of R. T. Muir." John Muir, one of the defendants called on the defence, says; "I believed R. T. Muir to be solvent when I took the bill of sale. I had not the slightest doubt of it. I had no reason to believe anything else. I did not know that he was unable to meet his liabilities in full. I believed he was able. I did not know that he was making the assignment to delay, impede or obstruct his creditors. William Muir, the other defendant, says; "I had seen the statement showing him, (Allan F. Muir,) to be worth $17,000, from the balance sheet of 1873. I thought it to be accurate. When the bill of sale was to be taken I asked if the statement of 1874 was out. Allan said it was not. I reminded him that the last statement I had seen made him worth $17,000, and inquired if the coming statement would show equally as well. He assured me it would. I had no reason to doubt the correctness of that answer and I did not. I first saw the balance sheet for 1874, in May, a month after the bill of sale. I did not know that Allan was unable to meet his liabilities in full. When he took the bill of sale I believed he was. About the time the bill of sale was given, John and I discussed the matter. I did not know that Allan made it with any view of delaying or impeding his creditors. I had no such thought." This is the whole of the evidence upon the real and most important point in the case, and it is, as I think, a complete answer to the objections taken to the findings of the jury and the judgment appealed from. But it was contended at the

argument that, even if the finding of the jury were allowed to remain, the plaintiff was entitled to a decree for setting the assignment aside, notwithstanding any want of knowledge on the part of the defendants of Allan F. Muir's insolvency or fraudulent intent, on the grounds that it was made by him in contemplation of insolvency and in violation of section 89 of the Act of 1869. This objection was overruled by the learned Judge, who expressed the opinion that if the plaintiff intended to rely upon it he ought to have set it out specifically in his writ and given the defendant an opportunity of answering it, so that the issues upon that allegation might have been submitted to the jury. In confining himself to the consideration of the issues settled upon and left to the jury, the learned Judge acted consistently with the rule observed in all courts, that is to decide no other than the subject matter complained of, to which the party charged has had an opportunity of putting in an answer. In *Story's Equity Pleadings*, section 257, he says; "every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal, for no facts are properly in issue unless charged in the bill, and, of course, no proof can be generally offered of facts not in the bill. Nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the Court pronounces its decree *secundum allegata et probata*. The reason of this is that the defendant may be apprized by the bill what the suggestions and allegations are against which he is to prepare his defence." See also *Zugasti et al.* v. *Lamer et al.*, 12 Moore P. C. C., 331; *Malcomson et al.* v. *Clayton*, 13 Moore P. C. C., 198. It is not alleged in the bill that any sale or transfer of property was made by Allan F. Muir in contemplation of insolvency, by way of security for payment to the defendants, or by way of payment to them, whereby the defendants obtained or would obtain any unjust preference over the other crediters under section 89. The allegation is that he made such transfer to the defendants with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud them, and that it was made with that intent to the knowledge of the defendants in the words of section 88. There was no issue requir-

ing the jury to decide, and they were not called upon to decide whether the assignment was or was not made by Allan F. Muir in contemplation of insolvency, and for the purpose of giving the defendants an unjust preference over his other creditors. They decided the issues raised upon the charges made in the bill to invalidate the assignment, and, as all the issues, with the exception of the first, that does not touch the real question involved in this case, were found for the defendants upon evidence that warranted such findings, the learned Judge in Equity, was, I think, right in upholding them, and giving judgment in favor of the defendants. The case of *Belcher et al., Assignees,* v. *Prittie et al.*, 10 Bing., 408, bears some resemblance to this. In that case a trader engaged in extensive concerns, being in embarrassed circumstances and likely to become bankrupt, at the request of his son to whom he was largely indebted, conveyed to trustees under his son's marriage settlement, certain property, on its being released from mortgage, as a security for or in discharge of the debt due from him to his son. He afterwards became bankrupt, and, a jury having found that the conveyance was not voluntarily made by way of fraudulent preference or in contemplation of bankruptcy, the Court refused to grant a new trial. TINDALL, C. J., in expressing his opinion, remarked that the question as to a man's intention of performing a certain act was to be judged of, not by the Judges of the land, but by a jury. It was, he said, a question involving the consideration of fraud, which, upon all occasions, had been said to be solely and peculiarly for the jury. The father, in that case, declared on his examination, under oath, that he did not make the conveyance in contemplation of bankruptcy. Here Allan F. Muir has made a declaration, under oath, that he had no idea he was, or was likely to be insolvent, and both of the defendants have sworn that they believed he was solvent, and did not know or believe that he was making the assignment complained of with the view of impeding or delaying his creditors. The jury were the most proper and competent persons to decide with what view this instrument was executed, and, as I can see no ground upon which their findings can be interfered with or impugned, I think the judgment of the Judge in Equity cannot be disturbed, and that the appeal therefrom must be dismissed with costs.

WICKWIRE ET AL. *v.* GOULD ET AL.

THE Wickwire dyke, being constructed outside of and affording valuable protection to the Grand Pré dyke, previously constructed, an appraisement was made under the statutes then in force, identical in terms with R. S., 4th Series, c. 40, s. 27, by which the proprietors of the Grand Pré dyke were required to pay to those of the Wickwire dyke £19 annually. This sum so settled was annually paid by the proprietors of the Grand Pré marsh so long as that marsh received any protection from the outer dyke. In 1869 a heavy gale and unusually high tide broke the outer dyke and submerged the Wickwire marsh, and the dyke was not fully repaired until 1871, when the proprietors called a meeting of the proprietors of the whole level, had freeholders appointed as before, and obtained from them an award of $200, to be paid annually by the proprietors of the Grand Pré dyke.

Held, that the statute could not be a second time invoked, and that the proprietors of the Grand Pré dyke could not be called upon to contribute anything beyond the annual sum of £19, originally settled.

Defendants having contended that they could not be required to contribute at all, as their dyke was not protected in whole by the Wickwire dyke, *Held*, that having acquiesced in the annual payments from 1848 downwards, and set out in their answer that they had offered and were willing to pay the amount after 1871, when the repairs were completed, it was too late for them now to raise such a question.

Held by MCDONALD, J., though the decision did not proceed upon that ground, that defendants were at liberty to insist, as a good defence, upon the fact that the necessary notices of meetings for the appointment of appraisers, &c., had not been legally given to *all* the proprietors of the inner dyke.

THIS was an appeal from the decision of the learned Judge in Equity, reported in *Russell & Chesley's Equity, &c., Cases*, 245. The facts of the case are fully stated in the judgment appealed from, (*q. v.*)

McDonald, Q. C., for appellants.—Reads R. S., 3rd series, chap. 40, sec. 27, p. 275, making provision for the assessment of the owners of inner dyked land, protected by an outer dyke, &c. When the Wickwire dyke was first built proceedings were taken, as directed by the statute, to fix the sum to be paid by the proprietors of the inner dyke. That sum was paid for twenty-five years, and no question raised until the Wickwire dyke was swept away. Then it was not wholly destroyed, but the amount of expenditure made necessary was very large, and the only question now is whether a contribution agreed upon at one time is, no matter under what circumstances, to preclude any revision of that amount. We contend that the proprietors of both dykes could at any time review the decision. It is not the outer dyke people who impose the tax, but a two-thirds majority of the whole. The reason of the thing is all in favor of our view. These provisions were made fifty years ago, when labor, &c., were cheaper than now.

Many of the proprietors own land enclosed by both dykes. The lands ceased to be protected, not by fault of the outer proprietors, but from a convulsion of nature. They then re-enclosed the lands. It was practically a new work, for the lands were as much covered by the sea as they ever had been. The great aboiteau and hundreds of yards of the other dyke were carried away. Even had they not been carried away at all, the price of labor has doubled or trebled, and a new appraisement would be necessary. The act contemplates an annual payment for certain objects. It does not say that when once fixed it shall never be deviated from. It could not have been intended to be permanent, because it contemplates an annual payment. They could not arrive at the annual cost of repair, because it depends on a variety of circumstances that no one could possibly foresee. Where, therefore, the statute provides for the fullest justice to the people, by placing the matter in their own hands, it seems a stretching of the statute to debar them from making any change. According to the construction placed on the act, the inner owners could, by two-thirds majority only, in a convocation of the owners of the whole, compel these repairs, costing $26,000, and only pay £19. Can it be possible that such a construction as that can be placed in the statute.

RITCHIE, E. J.—The question is whether there is not an undertaking, in consideration of that sum, great or small, to keep the dyke up.

McDonald, Q. C.—There is no undertaking. The parties by a two-thirds majority could increase or diminish the contribution at their pleasure. The destruction was a total one, and in any case the appellant must succeed.

J. S. D. Thompson, contra.—The argument just delivered is one entirely for the Legislature. We stand in this position, that, before the plaintiffs can succeed, they must show an express enactment enabling them to change the rate. It would be conceded that without the enactment as to outer dykes they could claim nothing from us, and the question is whether they have any legislation for the second assessment. It is not enough to argue upon the policy of the legislature, and the propriety of extending the provisions of the act. They must

show a clear and unambiguous statute. *Fisher's Dig. for 1875*, 314; *31 L. T., N. S.*, 746; *Broom's L. M.*, 5; *12 M. & W.*, 540; *14 M. & W.*, 694.

The whole argument contra has been, not that the statute is ambiguous, but that it would be a wise policy to extend it. The words of the statute show that future benefit is to be taken into consideration in making the assessment. Although there may be some force in the statement that the cost of labor and material has increased, there is no means of estimating that. If the assessment can be changed at all, how often can it be done? If it is good for one year it is good for every year, and every year the meeting can be called, and two-thirds of the whole level can increase or diminish it. (*McDonald, Q. C.*—They did increase it once.) *Thompson.*—There is no evidence of the appraisement having been changed under the statute.

YOUNG, C. J.—The Saxby storm adds a new element to the equities of the case.

Thompson.—No. It does not. All the witnesses swear that the new dyke is of no more benefit to them than the old one. The only new element is the increased expense of the building of the new dyke, which conferred no new benefit on our dyke. The exceptional cost of building the outer dyke resulted from the fact that they allowed it to remain two years with the tide running in and out. Cites 34 & 35 Vict., c. 37; c. 27, Acts of 1840; c. 11 of 1846.

In the amending statutes the words, "either wholly or partially," were omitted, and therefore, according to the amending acts, the inner dyke must be wholly enclosed or protected by the outer to make the statutes applicable. Our dyke is not "enclosed," because there is a portion which, if there was no other dyke than the Wickwire dyke would be exposed to the sea.

The proprietors of the whole level had not been summoned to the meeting. The words of the act are that the proprietors of the whole level shall be summoned. It is admitted that the proprietors of the dead dyke were not summoned at all, and that they were within the level. (MCDONALD, J.—Are they protected by that dyke?) Yes, they are. The vote was not taken by interest, although so demanded.

(YOUNG, C. J.—The whole difficulty arises out of the amount. They thought it unreasonable. They did not object to it otherwise, and I think they should not. RITCHIE, E. J. —They measured it by the expense of the construction, and not by the benefit to the Grand Pré dyke.)

Thompson.—The cost of construction is no criterion at all. It does not follow that the cost of protecting the Grand Pre dyke would be as much as that of protecting the Wickwire dyke, as there would be three hundred acres between it and the line of the Wickwire dyke, so that the force of the sea would be less.

We have evidence from one of the plaintiffs that one of the elements that entered into the expense of the construction of the Wickwire dyke was the delay in putting it up.

McDonald, Q. C., in reply.—The statute does not say, "where the whole level shall be enclosed," but "where any lands enclosed by dykes shall be protected by other dykes." The Grand Pré dyke is protected by the Wickwire dyke. If If the dead dyke was an inner dyke there would be something in the argument contra on that point. If there is no question with regard to the jurisdiction, there can be none in regard to the money. See Act of 1846, cap. 11, sec. 9.

The question of expense was a very material one for those called upon to decide the matter. The evidence shows that, in fact, the repairing of the old dyke amounted to the construction of a new work. We have the admission of the defendants that during the two years this dyke remained down their only protection was the inner dyke, so that the outer dyke, when built, was in fact a new construction.

MCDONALD, J., now, (December 10th, 1878,) delivered the judgment of the Court:—

Many years ago after the Grand Pré dyke was constructed, the Wickwire dyke was built outside of it, enclosing a large tract of land and affording the former dyke valuable protection. By the evidence of Albert Chase we find that in 1847 or 1848 he acted as an appraiser under the statute relating to dykes and marshes, and that he, together with the other appraisers acting with him, made an award by which the proprietors of the Grand Pré dyke were required to pay

to those of the outside or Wickwire dyke the sum of £19 a year for the benefit accruing to the former from the construction of the latter dyke. Other witnesses spoke vaguely of prior awards, but of this we have direct and positive evidence. This sum of £19 was annually paid from the date of the award and no difficulty arose until the year 1869, when a violent gale broke through and carried away a large part of the Wickwire dyke, leaving the land reclaimed by it submerged. The condition of the latter dyke was then such as to afford no protection to the Grand Pré dyke, the proprietors of which found it necessary to repair it and depend upon it alone for the protection of their lands, until some time in 1871 when the Wickwire dyke was fully repaired.

At the time that the award referred to was made, the statute authorizing the same was identical with the one in force in 1869 and so has remained ever since. It provides that where lands enclosed by dykes erected outside of the same be enclosed and protected, the commissioners in charge of the lands reclaimed by the outer dykes shall call a meeting of the proprietors of the land within the whole level contained and enclosed by such outer dykes, who shall reside within the township or within ten, (or in the county of Kings six,) miles of the place where such lands lie, giving six days notice of the time and place of meeting to each proprietor or his known agent; and two-thirds, in interest, of such owners or occupiers present, or, in case of their neglect, the commissioners shall elect not less than three nor more than five disinterested freeholders, who, being sworn before a Justice, shall determine what portion or degree of benefit has accrued or is likely to accrue to the old or inner dykes and the lands lying within the same, from the new or outer dykes, and shall settle and declare the proportions of expense the proprietors of land within the old dykes ought annually to contribute and be assessed towards the maintenance and repair of the new dykes, and such persons, or two-thirds of them shall make a report in writing of their proceedings, which shall be entered in the book of record for such outer dykes, and every sum or proportion of expenses so settled and declared shall be borne upon the lands within the inner dykes and be assessed and collected as other dyke rates.

If such outer dykes shall at any time cease, in whole or in part, to protect such inner dykes, the lands within the inner dykes shall not, for such time, contribute or be assessed to support or repair the outer dykes.

"If at any time two-thirds in interest of the proprietors of the lands within the inner dykes shall be apprehensive that the outer dykes are unsafe or out of repair, two-thirds in interest of the whole level may call upon one or more commissioners to examine the outer dykes; and if such dykes appear to require repair he or they, with the assent of such two-thirds in interest of the proprietors of the whole level, shall forthwith cause the same to be repaired or otherwise, with the like consent, put the inner dykes in a state of repair as shall seem most advisable. If the inner dyke be repaired, then the proprietors of the lands enclosed thereby shall bear the expense."

The plaintiffs, having in 1871 finished the repairs of the Wickwire dyke, were not satisfied with the sum formerly paid them by the defendants, but called a meeting of the proprietors of the whole level, had freeholders appointed as before, and obtained from them an award of $200 to be paid annually by the defendants instead of the £19 formerly paid. This amount the commissioners refused to assess upon the proprietors of the Grand Pré dyke and application was made to the learned Judge in Equity to compel them to do so. The learned Judge, being of opinion that the provisions of the statute could only be once brought into operation in this respect, decided that the defendants were entitled to a decree in their favor, from which decision the plaintiffs appealed to this Court.

Much evidence was produced to show that the plaintiffs expended a large sum of money in repairing the dyke, and the learned counsel for the plaintiffs seemed, at the argument, to think that that fact should have largely guided the appraisers and the Court in coming to a just conclusion. But that view of the case does not appear to me to be supported by the statute, which directs that the freeholders shall determine what *proportion or degree of benefit* has accrued or is likely to accrue to the *old* or *inner* dyke, and shall settle and declare the proportion of the expense which the defendants ought to

pay annually. To my mind it is clear that it is quite immaterial what the expenditure on the outer dyke was, in estimating the amount which the proprietors of the inner dyke ought to pay, because they are only liable for a sum equivalent to the *degree of benefit* resulting to *them* from the work. Any other view of the law would be quite inconsistent with justice. It would be authorizing the taking of money out of the pockets of one party. without an equivalent, and putting it into those of another; and I find it impossible to conclude that the Legislature ever intended any such thing. The words of the statute preclude such a construction. But I cannot find anything in the evidence or the exhibits which sufficiently directed the attention of the freeholders to that important point; nor does their award show that it was so directed. Neither can I divest myself of the impression that the disproportion existing between the last award and that which was adopted and acted upon by both parties since 1847 or 1848, down to 1869, is very much the result of a misconception, on the part of the last appraisers, of the true basis which they ought to have adopted in estimating the amount of their award. Irrespective of the sum expended by the plaintiffs, it is quite possible that the defendants could, by a comparatively trifling expenditure on the inner dyke, have sufficiently secured the same and protected their own lands; and whatever the expenditure on either dyke might have been, it seems to me clear that the contribution to be made by the proprietors of the inner dyke to those of the outer one should only be the amount which the outer work saved to them; not simply a proportion, as such, of what it cost the others. Assuming that the amount settled and declared in 1847 or 1848 was sufficient, as evidenced by the acquiescence of both parties in that settlement down to 1869, the plaintiffs could have no just claim to more than that amount, if we believe the evidence of. John S. Brown,—himself one of the commissioners of the Wickwire dyke,—who says that "previous to the storm of 1869 the outer or Wickwire dyke protected the division dyke just as it does now." And, again, he says; "the new dyke affords no better protection." In this he is corroborated by other witnesses. and, after reading the whole evidence carefully, I have no doubt that he told the truth.

But, apart from that view of the case, which is not the one upon which it mainly turns, and which I only mention to show that, as I think, our decision cannot work injustice to the plaintiffs, if they be paid as heretofore, I feel bound to concur in the opinion that there is nothing which justifies calling the statute into operation more than once upon the question in controversy. If permitted to do so after an extraordinary gale, by which both parties suffered more or less damage, why not after an ordinary one, also occasioning much damage? The statute itself draws no distinction between an extraordinary and an ordinary storm, as affecting the obligations of either party to repair or pay; nor can we do so. But it requires the proprietors of the inner dyke to pay annually the amount settled by the freeholders, and requires no more, whether yearly repairs be necessary or not; and I cannot help thinking that it would be strange legislation which would require persons in the position of the defendants, to pay additional contributions on each occasion of serious damage by storms, without, at the same time, exempting them from any contributions, when no damage was in fact sustained. But, whatever the intention of the Legislature may have been on that point, the words necessary to sustain the contention of the plaintiffs have not been used in the act, and it is a well established rule of law that those who seek to impose a burthen upon the public should take care that their claim should rest upon plain and unambiguous language; *Co. of Proprietors of Leeds and Liverpool Canal* v. *Hustler*, 1 B. & C., 424. "In order to make the subject liable to the payment of a tax, the language of an act of parliament ought to be clear and unequivocal, so as to leave no reasonable doubt of the intention of the Legislature to impose a burthen upon the subject." *Ramsden et al.* v. *Gibbs*, 1 B. & C., 319, 324. "An act imposing a liability on a hundred must be construed as in cases of felony under it." *Barwell et al.* v. *Winterstoke*, 14 Q. B., 704. In *Denn e d. Manifold* v. *Diamond*, 4 B. & C., 244, BAYLEY, J., said, "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language." In *Gozling* v. *Veley*, 12 Ad. & El., 408, WILDE, C. J., said; "The rule of law that no pecuniary burthen can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or

toll, except upon clear and distinct legal authority, established by those who seek to impose the burthen, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it." In this case the plaintiffs, without the statute, could have no claim whatever, and they have failed to show that the Legislature ever intended the statute to apply in a case like this. It simply authorizes certain things to be done on the occurrence of a certain event, but goes no farther. Here the event occurred some time before 1848. The statute was then brought into operation and complied with, and cannot again, as I think, be brought into operation on the present occasion without straining its meaning and violating a well defined rule of law. That rule, being generally as I stated it, applies with more force in a case like this, in which its aid is invoked more for a private than a public purpose. The Legislature, as it appears to me, sufficiently favored the proprietors of the outer dyke when it was left optional with them to repair or not repair unless two-thirds in interest of the proprietors of the whole level, which must of course include themselves, should concur in resolving to repair. In case they did not so concur, the proprietors of the inner dyke were powerless to compel them to do so, and could only have protected themselves by securing the inner dyke at their own expense, as best they could, notwithstanding that they had previously for many years contributed largely towards keeping up the outer dyke, when, perhaps, no repairs were needed.

I concur also in the opinion that it is now too late for the defendants to attempt evading the payment of any part of the claim, on the ground that the inner dyke is not protected in whole by the Wickwire dyke, after their long acquiescence in the old award, and the fact set out in their answer to the plaintiff's bill, that they offered and were willing to pay the amount of it to the plaintiffs since 1871, when the repairs were completed. I am not, however, satisfied that the defendants were not at liberty to insist, as a good defence, upon the fact that the necessary notices of the meetings for the appointment of the appraisers, &c., had not been legally given to *all* the proprietors of the inner dyke. In *Stafford* v. *Hamston*, 2

Bro. & B., 691, it was held in trespass for taking the goods of the plaintiff under the authority of the Commissioners of Sewers, to pay rates, that the decree of the Commissioners was not conclusive, but that the plaintiff might prove the fact of his deriving no benefit from the sewer on account of which he was rated, that being an essential part of the case and involving the question of the Commissioners' jurisdiction, though such evidence was offered before the Commissioners, but not received. See also *Fisher's Digest*, 7803, and the authorities there cited. In the case before us the proprietors of the Grand Pré lands who were not legally notified as required by the statute,—and, no doubt, there were some not so notified,—ought not, as it appears to me, to be concluded by what the appraisers did, any more than the plaintiff in the case referred to. Having had no notice, as the statute requires, they were not parties to the proceedings at the meeting, and had no voice in the appointment of the freeholders, who were to settle the amount, if any, to be paid by them. A special authority given by statute must be construed strictly. *Regina* v. *Ellis*, 6 Q. B., 501. Strict compliance with the requirements of the statute to give the prescribed notice of the time and place of meeting to *each* proprietor, or his known agent, appears to me essential to the validity of the freeholders' appointment. The defendants and those for whom they act are entitled, according to the case cited, *Barwell* v. *Winterstoke*, to insist upon the same particularity in complying with the statute as if this were a case of felony against them under its provisions. Notice to some of the proprietors does not satisfy its requirements to give notice to *each* of them. Without such notice, had the freeholders named any legal jurisdiction or authority at all to act? I think they had not. If not, then their report and award are void, and, being void, cannot be made valid by any delay in taking exception to it. "If a proceeding be completely defective and void, or, in other words, a nullity, the defect is not waived by any delay of the opposite party." *Ch. Arch.*, Q. B. Prac., (12th ed.) 1874, and authorities there cited. See also in the same volume, p. 1471. This case appears to me to be a stronger one than *Stafford* v. *Hamston*, already cited, in which the plaintiff appeared to have been regularly brought before the commissioner, and to have had full know-

ledge of the proceedings, but took no steps to have them set aside. Without, however, deciding this case upon that point solely, the defendants are, in my opinion, entitled, upon the whole question, to have this appeal dismissed with costs.

GENERAL MINING ASSOCIATON *v.* VICTORIA COAL MINING COMPANY.

Notice of non-pros may be given at the close of the second sittings after the cause is at issue, although the cause has not been called and passed.

In this cause *Rigby, Q. C.*, had moved for judgment as in case of non-suit against the plaintiff, on affidavits setting out that the writ had been issued August 9th, 1877, to which defendant duly pleaded, and the cause was at issue at the sittings of November, 1877; that notice of non-pros was served upon the plaintiffs' attorney on the last day of the April sittings, 1877; that notice of trial had been received by the defendant for the November sittings, 1878, when the cause was reached and passed, plaintiff not proceeding with the trial.

The point was taken by the plaintiff that, at the time the notice of non-pros had been given, the cause had never been actually reached.

Sir William Young, C. J., now, (December 10th, 1878,) delivered the judgment of the Court, holding that the notice of non-pros could be given at the April sittings, 1878, although the cause had not then been actually reached and called.

COOLAN *v.* McLEAN.

The Court will not hear an appeal from the County Court in a cause originating in the Magistrates' Court.

This cause was appealed from the Magistrates' Court to the County Court, where the appeal was dismissed, but a question reserved by the Court was sent up to this Court, by consent. The cause came on for argument before Sir Wm.

YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J., on December 11th, 1878.

DESBARRES, J.—Unless the statute is express, giving an appeal to this Court where there has been an appeal from the Magistrates' Court to the County Court, I would not hear this appeal.

MCDONALD, J.—The summary jurisdiction of the Supreme Court is taken away.

JAMES, J.—It surely never was intended, after taking away the summary jurisdiction, to bring it back in an intensified form, by sending cases from the Magistrates' Court through the County Court to the Supreme Court.

C. J. McDonald, for appellant.—The appeal is given from every decision of the County Court in all cases except on questions of fact and there is nothing in the statute making the decision of the County Court final.

Sedgewick, contra, was not called upon.

Appeal dismissed, but without costs, the point being new.

COCHRAN *v.* LARCOM.

CAUSES appealed from the Magistrates' Court to the County Court, cannot be brought by appeal to this Court.

THIS was an appeal from a decision of the County Court reversing a decision of Justices of the Peace in a proceeding for penalties under the game laws.

Rigby, Q. C., for appellant.—The statute gives us an appeal, and there is nothing to take it away. The Judge fixed the fine at a heavy amount expressly in order to give the defendant an opportunity to appeal.

Motton, contra, was not called upon.

SIR WILLIAM YOUNG, C. J.—We hold that all decisions from the Magistrates Court go to the County Court exclusively, and end there.

BREMNER *v.* WALLACE.

DEFENDANT in replevin avowed for rent, and plaintiff did not reply, relying on the statutory replication denying the facts alleged in the plea.

Held, that a replication was necessary to put the cause at issue.

Leave given to the plaintiff to file a replication.

THIS was an action of replevin; avowry for rent, to which no replication was filed, and, after notice of trial given by the plaintiff, the cause, when reached on the docket of trials, was called and passed, the defendant not being present.

Foster, for plaintiff, moved on December 11th for judgment for plaintiff, on the ground that the cause had not been tried by the defendant when reached on the docket.

MCDONALD, J.—Should you not have asked for judgment on the last day of the sittings?

Foster.—It was on the other side to open. I could not prove a negative. I assume that the cause was at issue. I did not put in any replication, considering that the statute placed the cause at issue, and when it came up for trial I was prepared, but the defendant did not go on. If the Court hold that the cause was not at issue, I ask for leave to file a replication.

Wallace, contra.—There must be a replication in replevin suits. I can find plenty of cases for that.

SIR WILLIAM YOUNG, C. J., (December 21st, 1878,) delivered the judgment of the Court:—

This case involves the question whether it is necessary to file a replication in replevin. We have considered that question, and think it better to adhere to the English practice. We hold, therefore, that in replevin a replication is necessary. Each party is an actor in replevin, and that distinguishes it from other cases. We give leave to the plaintiff to file a replication.

Wallace.—I suppose the rule is discharged with costs.

YOUNG, C. J.—No costs.

McCULLY *v.* DYKEMAN.

RULE *nisi* for new trial granted by the Judge on Circuit, allowed to be amended by inserting grounds brought to the notice of the Court by affidavit on the first day of term.

THIS cause was tried at Truro, where a verdict was found for the plaintiff, and a rule *nisi* granted to set it aside.

The *Attorney General*, on the first day of term, moved for a rule to set the verdict aside, on the ground of corruption of the jurors, misconduct of the jury at the view had by them in the course of the trial, and relationship of some of the jurors to the successful party.

SIR WILLIAM YOUNG, C. J., (December 21st, 1878,) delivered judgment:—

A rule was granted for a new trial by the Judge who tried this cause, which is now entered for argument. Here is an application upon numerous affidavits setting out entirely new grounds. One of them mentioned the other day was the corruption of the jurors. We do not find any evidence supporting that, and therefore it is struck out. The other ground is that of misconduct at the view of the premises had by the jury in the course of the trial. The difficulty here is that we have a rule for a new trial outstanding, and we cannot grant two rules in the same cause. At the same time, we do not feel at liberty to shut out the grounds raised in these affidavits. We therefore declare the first rule to be amended by adding the grounds set out in the affidavits.

Rigby, Q. C.—We might desire to raise the question whether the Court has authority so to amend the rule. The application was *ex parte*, and has been decided without hearing us. If anything took place at the view, it was well known on the last day of the term in the country.

After some discussion the Court allowed plaintiffs to shew cause why the rule should not be amended as proposed, and appointed Saturday, January 4th, for the argument, no affidavits to be then produced by plaintiffs, but simply the legal question as to the right to amend the rule *nisi* to be argued.

Rigby, Q. C., now, (January 4th, 1878,) shows cause. I object to this ground appearing in the rule as if taken in the first instance. We wish it to appear as a fact that this ground was an afterthought. We contend that all the facts stated in support of this application were known immediately after the trial. It would be better to take a separate rule. It is virtually granting two rules, to amend this.

Foster, Q. C.—I have just received another affidavit since, which we were unable to get when we applied; the affidavit of the foreman.

Rigby, Q. C.—I object.

DESBARRES, J.—We can't go on receiving affidavits *ad infinitum*.

Graham.—It is only just to the foreman.

MCDONALD, J.—You are asking for a rule to amend the rule to amend

Henry.—As to the question of the legal right to amend the rule and add the ground of misconduct, cites *Ch. Ar.*, 1536, 1539.

The motion is too late, even in the form of a motion to amend the rule. I rely on this point on the principle as to the time within which a new rule could be taken, which is essentially the same case as this. I admit that the Court has the discretion, and I argue to the discretion of the Court. It is nowhere stated in their affidavit that the facts were not known. If we can raise on the main argument the question whether the rule should have been granted on the affidavits they have produced, that is sufficient.

The Court allow the amendment.

IN RE LEAKE & LAIDLAW, INSOLVENTS.

A CLAIM less than six years old at the date of a writ of attachment is not barred by the statute of limitations because the six years expire before the declaration of a dividend.

IN this cause the claimant, Yorke, filed a claim against John Leake, one of the partners of the firm of Leake & Laidlaw, against whom a writ of attachment had been issued under the Insolvent Act of 1875. The claim was collocated on the dividend sheet of the partnership estate, and *S. A. Chesley*, on behalf of the claimant, or his assignee, applied to have a separate dividend sheet of the private estate of John Leake prepared, and that this claim should be placed on such separate dividend sheet. After this the inspectors objected to the claim *in toto*, on the ground, among others, that the debt was barred by the statute of limitations.

The Judge below, (MORSE, J., of the County Court, district No. 5,) held that, although the debt was not barred by the statute at the time of the assignment, it became so before the declaration of the dividend, and, as there were no other private claimants, he refused to order the preparation of a separate dividend sheet. The appeal from this decision was argued January 9th, 1879, before DESBARRES, MCDONALD, JAMES and WEATHERBE, J J.

S. A. Chesley, for appellants.—Our claim was nearly six years old when the party went into insolvency, and the Judge held it barred by the statute of limitations, adding the time after the assignment to the time before.

Motton, Q. C.—While I admit that this point was the sole point as to the statute of limitations, we claim to sustain the judgment on the other ground, that there was no evidence of separate property.

Chesley.—The only ground of the appeal is as to the statute, and I contend that if the Judge was wrong as to that, it must be sent back, as we are entitled to the judgment of the Judge below in the first instance. Cites sec. 128 of the Insolvent Act of 1875, amended by Act of 1876, cap. 30, sec. 16, as to effect of appeals; also Act of 1877, cap. 41, sec. 28, to show that if the appeal succeeds here, these orders made below must be discharged with costs.

As to the statute of limitations; the statute ceases to run with the issue of a writ of attachment. The issue of a writ, vesting the property in the assignee, creates a trust in the assignee for the benefit of all creditors having claims then provable, and the trust stops the statute. Cites Insolvent Act of 1875, sec. 16, providing that the Assignee shall hold in trust for the insolvent and creditors; the meaning of which last term is defined by section 2, sub-section *h*; section 80. Cites *in the matter of Coles*, in *Fisher*, p. 737; *Ex parte Ross*, 2 Gl. & J., 46 and 330; *6 Gray*, 519; *7 Metcalf*, 352; *L. R.*, *7 Ch. App.*, 646.

Motton, *Q. C.*—Refers to position of the claimant and the peculiar nature of his claim. It was a bogus claim in *toto*. (Per CURIAM.—That is for the Judge of the County Court.) The claimant was not properly before the Court. He had no claim against the firm estate. There was no property assigned outside of the partnership. There is no evidence that there was any private estate of Leake. The *onus* rested upon them to show that there was a separate estate. There is nothing to prevent the operation of the statute, as there was no estate of John Leake proved. The claim was not a claim against the partnership of Leake & Laidlaw. *10 Exch.*, 829; *Clarke*, 20; *6 M. & W.*, 321.

The claimant abandoned his claim against the estate of Leake & Laidlaw and made a distinct application against the estate of John Leake. The case in *6 Gray*, 519, is in our favor. Cites *7 Gray*, 787, 387, The statute will run unless some of the suspending causes intervene. I admit that the claimant had a right to rank at the time of the assignment; but afterwards it became barred. The statute was running against the claim, and nothing would have prevented it but the bringing of an action; *13 Gray*, 381; *4 Taunt.*, 20.

DESBARRES, J., now, (January 10th, 1879,) delivered the judgment of the Court.

In the matter before us yesterday, we have all turned our attention to the question raised, and, as the counsel must have observed yesterday, there was a pretty strong opinion among us that the Judge had taken an erroneous view of the matter. It is hardly to be wondered at that he should have done so,

not having had any authorities to assist him in forming his judgment. The strong impression we had yesterday has been confirmed by looking at the cases since. We think it would be monstrous if, in a case like this, a plea of the statute of limitations could be set up, and we are disposed to act upon our impression, and decide accordingly.

IN RE HEFFERNAN ESTATE.

TESTATOR'S will was attacked by the Trustees of the Methodist Church, Guysborough, (to whom the testator had left the bulk of his estate by a previous will,) on the ground that undue and improper influences had been used. The Judge of Probate decided that such influences had not been made out with sufficient clearness to avoid the will and directed the costs of all parties to be paid out of the estate. The decree as to costs having been appealed from, the Court held that the Judge of Probate had no power to decree the payment of costs out of the estate, and could only award them to be paid by the party against whom his decision was made, but that this Court, on review, could direct what costs should be allowed and from what fund. The parties were accordingly directed to pay their own costs up to the time of the decree, and the appeal was sustained, with costs to be paid by the Trustees.

IN this case the last will and testament of the late Hon. Mr. Heffernan was attacked in the Court of Probate on the ground of undue influence. The Judge of the Court of Probate in Guysborough County decided that a case had not been made out for setting aside the will, but directed that the costs should be paid out of the estate, and, under this direction, bills of costs were taxed as follows; For the Judge, $63.10; for the Registrar, $196.04; for the Proctor, $173.00; for witnesses' fees, $60.67; in all, $492.81.

The decree was appealed from, and argued before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J.

Rigby, Q. C., for appellants.—The question raised in this case is solely as to costs. The court below made the costs of the contestation payable out of the estate. I contend that costs should be decreed against the trustees of the church, on the ground that, before petitioning, they had ample evidence as to the state of the testator's mind, and must have known it to be sound, and, further, that there was no legal proof given of the execution of the earlier will, which the petitioners sought to establish, secondary evidence having been received

without sufficient proof of its having been destroyed, and, therefore, that the trustees had no *locus standi*; R. S., ch. 90, sec. 62; *Dodd & Brooks' Court of Probate*, 817, 818, citing *2 Hagg.*, 225; *L. R., 1 P. & D.*, 194, 348; *L. R., 2 P. & D.*, 264; *2 Sw. & Tr.*, 35; *Fisher*, 8394; re *Estate of Pine, 3 Russell & Chesley*, 307.

Motton, Q. C., contra.—The costs were rightly ordered to be paid out of the estate. The testator had always given out that he intended to leave his property to the Methodist Church, in which he took a warm interest, and, just before leaving for Halifax, where the last will was made, he had stated that he intended that the church should receive his property. In all the wills made by the testator he had exhibited his warm interest in the church. The circumstances attending the execution of the last will were such as to justify the investigation and impose a duty upon the trustees to institute it. *Davis* v. *Gregory et al.*, 43 Law Journal R., p. 33, establishes the principle that where the conduct of the testator is such as to lead to the litigation, the costs will be made payable out of the estate. The statute cited, sec. 62 of the Probate Act, refers solely to adjudications connected with the settlement of the estate. There is nothing in the act relating to such proceedings as these, which arise on a petition for proof in solemn form. This Court now has a full discretion as to costs.

Sir William Young, C. J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

The last will of the testator, executed at Halifax, 15th February, 1878, having been disputed, and a volume of evidence taken at Halifax and Guysborough, the Court of Probate pronounced a decree that the will had been duly executed, that the testator was of sound mind; and, undue and improper influence having been charged, the Judge decided that it had not been made out with sufficient clearness to avoid the will, and directed the costs of all parties to be paid out of the estate. He did this, as he considered that there existed good and sufficient grounds for resisting the will. These costs come to a very large sum, and an appeal was taken against the decision upon that point, which was argued before us

early in the term. Though a question of costs only, it involves a consideration of the whole case, not with the same minuteness as if the main questions were at issue, but sufficiently full to understand its position.

The testator had lived for many years at Guysborough, where the will was submitted to proof. He married Miss Wylde, by whom he had no children. She died in 1875, his own age at that time being nearly 80. He had numerous relatives through his wife, several of whom had stayed with him and were objects of his affection, and his property was worth, as some of the witnesses say, several thousands of dollars, while one of them, having the means of knowing, estimates it only at £800. He is shown to have made four wills, one as far back as 1863 or 1868, a second in September, 1877, a third on the 20th November in the same year, and the last, as I have said, on the 15th of February, 1878. He was warmly attached to the Methodist church at Guysborough, and on intimate terms with the Rev. Mr. Borden, the pastor there. We have no correct account of the first will that was made, but, by the second and third, he left the bulk of his estate to the trustees of the Methodist church at Guysborough, excepting only some small bequests. So his affairs stood in 1877, when he came to Halifax along with Mr. Cunningham, his brother-in-law, his principal object being to attend the meeting of the Legislative Council, of which he was a member. While here he had boarded with his sister-in-law, Mrs. Harriet Metzler, who had lived with him upwards of twelve years and was married from his house. He saw a good deal of his other relations, and, for some reason, on which the evidence throws no light whatever, a complete change took place in his affections and his previous purposes in the distribution of his property. He had had no difference with the Methodist body or its pastors; a very remarkable letter from Mr. Borden of 11th February, but which did not reach him until after the last will was executed, showed how warm a friendship had subsisted between them, but it produced no effect. The Rev. Mr. Heartz, who conducted himself with singular delicacy and discretion, saw him occasionally till the 3rd of April, when he died; but was wholly uninformed of his ultimate dispositions. When these were known, therefore, it is not to be won-

dered at that they excited no little surprise, and, with the surprise, there was mingled, no doubt, a feeling of indignation and of suspicion. Still I think it would have been wiser had the trustees acted on the opinion given them by Mr. Heartz, and refrained from attacking the will. They have not appealed from the decree upholding it, and there is no evidence that could justify any court in setting it aside. Mr. Isaac Wylde, the father of the residuary legatee, would, perhaps, have done wisely in employing or advising the testator to employ some disinterested lawyer to prepare the will and attend to its execution. But still, with all the circumstances in proof, and after a searching cross-examination of all the witnesses on both sides, there is no ground on which a charge of undue influence or of any manœuvering or deceit could rest. That the testator, at the date of the will, was of sound and disposing mind, and knew perfectly what he was doing, is abundantly proved by the concurring testimony of Drs. Parker and Crane, the Rev. Mr. Murray and other reliable witnesses; the only evidence to the contrary being that of Mr. Cunningham,—that of Mr. Tremain being very cautious and guarded. The will, besides, except that it substituted a legacy of $400 to the church for a bequest of the whole or nearly the whole estate, is unexceptionable, and is just such a disposition of his property as a man acting on the usual impulses of our nature and the principles which govern our actions, might be expected to make.

The decree acquits Mrs. Metzler and other relations from the charge of having used undue influence, but it acquits them in very moderate terms. The point, the Judge says, has not been made out sufficiently clear; but, looking at all the evidence, I am of the opinion that the Judge might have safely gone further than he has done. If undue influence were exerted, it has been most dexterously concealed and most pertinaciously denied. Not even a hint, except on one unimportant point, not a single instance of importunity or suggestion has been admitted or is in proof.

And now as to costs and the grounds of appeal resting mainly on the 62nd and 82nd sections of chapter 90 Revised Statutes, which I insert here:

"62. The judge shall tax and award such costs as are allowed by law, to be paid by the party against whom the

decision may be made in any matter contested before the Court, and if against the executor or administrator to be paid out of his own estate, or out of the estate of the deceased, as may be just and proper, which taxation and order shall have the like effect as a judgment in a court of record, and execution may be issued by the judge in the form in the schedule. Any such taxation or order may be reviewed by the Supreme Court, or by any judge at Chambers, upon notice given to the party in whose favor the taxation and order may be made, without any appeal being entered and perfected, and such order made therein as to such Court or judge shall seem just and proper.

"82. The Court in which the appeal is heard may direct the costs thereof to be paid personally by the parties against whom such costs shall be awarded, or out of the estate which may be the subject of appeal. The payment of the costs may be enforced against the appellant by execution or suit on the bond, and against other parties by execution; but no such suit on the bond shall be commenced without the order of the court of appeal or a judge thereof."

These two sections are substantially the same as the 47th and 61st sections of the Provincial Act of 1842, the 5th Vict., chap. 22. This act embraces the whole Probate law in 70 sections, forming a complete code, and every line of it was carefully considered by the government that introduced it, of which I was a member. The language of the 47th section, then, has a peculiar significance, and must have full weight. Then, as now, there was a Probate Court in every county. The judges were, as they still are in some cases, laymen, and it is easy to see why the Legislature were jealous of entrusting to them so delicate a matter as the adjudication of costs, especially as the full right was reserved to the Supreme Court upon appeal. The true construction of these clauses is now, for the first time, so far as I know, before this Court. Had we sought for an example of the danger of clothing a Court of Probate with authority to award and tax costs out of the common run, it would be found in the papers under our hands. Under the 62nd section of chapter 90 we required the costs to be produced that had been taxed against the estate on behalf

of the trustees. I have read them with amazement, as they were taxed by the Judge, and are now certified by the Registrar. There are eight bills, in all, taxed, as was stated at the Bar, without notice, and on the point of being enforced by execution, when a Judge's order was obtained for an appeal under section 81. There are eight bills, as I have said, in all; two for the Judge, $63.10; four for the Registrar, $196.04; one for the Proctor, $173; and one for witnesses' fees and expenses, $60.67, making altogether $492.81, on one side of this contest. There are two small bills besides of $6.30. I shall not go into the details of these bills, but, comparing them with the tables of fees in chapter 114, I am satisfied that one-half, or perhaps two-thirds, would be struck off on taxation. They would then probably be as much too little for the work done as they are now too large. I am of opinion, however, that on the true construction of sec. 62, ch. 90, a Judge of Probate, in every matter contested before him, must tax and award such costs as are allowed by law, to be paid by the party against whom his decision may be made. In no case, as I think, can he award costs to be paid out of the estate. All cases in which such costs should be awarded, or exceptional costs taxed, must come here by appeal, and, if any inconvenience or wrong shall result from this view, it is for the Legislature to amend the act. But the case being here, it is our province, under section 82, to decide what costs should be allowed, and from what fund. The Legislature has clothed us with the same power as the Ecclesiastical Courts possess in England, and the practice directing costs to be paid out of the estate being of modern origin, the authorities upon it are within a small compass. They are to be found in *Williams on Executors*, 330; in *Dodd & Brooks' Law and Practice of the Court of Probate*, section 813, and are especially illustrated in a case subsequent to both,—that of *Davis* v. *Gregory*, 43 Law Journal, 33. The able judgment of Sir JAMES HANNEN, in this last case, covers the whole ground, and practically leaves every case to be decided on its own circumstances as they are in proof. Is the testator, by reason of his conduct, to be considered to have been the cause of reasonable litigation after his death? Has he himself caused the litigation? Now this abundantly appeared in the Davis case. The testator, if not

mad, acted as a madman. He secluded himself from society, tore up his clothes, was under the influence of drink, became passionate, irritable and vicious, and his will was marked by many singular circumstances. The Court, therefore, while upholding the will, allowed the costs out of the estate. But there could not possibly be a greater contrast than between that case and the case in hand; and, upon the facts as already stated, I am of opinion that we would not be justified in directing the costs to be paid out of this estate.

The only question that remains is, shall the trustees pay to the executors their costs on the enquiry below. In many of the cases, as in *Young* v. *Dendy*, L. R., 1 P. and D., 349, the contending parties were left each to pay their own costs. Ought that to be the rule here? Now, there is no doubt that the trustees of the church were most painfully surprised by the sudden and thorough change of the testator's mind and purposes, of which they had had no notice whatever, not a word having been said indicative of such a change, either to Mr. Borden or Mr. Heartz; that if the trustees put faith in the representations of Mr. Cunningham, one of themselves, as expanded in his evidence, there was ample reason to dispute the will; and that Mr. Borden, after the enquiries instituted in Halifax, came to the conclusion that the will should be set aside. The trustees, also, representing a religious body, may have thought themselves obliged to go further in protecting their interests than they would have gone in protecting their own. Upon the whole, I think justice will be done by directing that the several parties should bear their own costs up to the time of the decree; that the decree, so far as it directs the costs to be paid out of the estate, and the bills of costs taxed under it should be set aside, and that the appeal should be sustained with costs, to be paid by the trustees named in the proceedings and upholding the decree.

IN RE ESTATE OF RICKARDS.

AT a meeting of creditors of W. W. Rickards, an insolvent, under the Insolvent Act of 869, held in May, 1873, objections were filed to the claim of Joseph S. Rickards, and duly served, about two years after which Joseph S. Rickards himself became insolvent. His assignee in 1878, Joseph S. Rickards having died in the meantime, obtained a rule granting him permission to file answers to the objections within fifteen days, contestant to have a like time to reply.

Held that, although under the Act of 1875, the Judge of the Insolvent Court had the discretion to grant an enlargement of the time for filing answers, and could make such an order even after the expiration of the three days prescribed by statute, in the present case in which the application was not made until more than four years after the time when it should have been made to the assignee under the Act of 1869, the order could not be upheld.

THE facts in this case, briefly stated, are as follows:—W. W. Rickards became insolvent in 1873, and a claim was filed against his estate by Joseph S. Rickards, in May, 1873. To this claim objections were filed and served under the Insolvent Act. Joseph S. Rickards became insolvent about two years after filing the claim, J. H. Harvey becoming his assignee, some time after which Joseph S. Rickards died. No answer to the objections was filed by Joseph S. Rickards during his lifetime, nor by his assignee after his death. At length, nearly five years after the insolvency of W. W. Rickards, Harvey obtained from the Judge of the County Court an order allowing him to file answers to the objections.

An appeal was taken from this order and argued this term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and SMITH, J J.

Meagher, for appellant.—The objections were filed under sec. 71 of the Act of 1869. The only person who could under that act enlarge the time was the assignee. The Act of 1875 gives the jurisdiction in contestation to the Judge; by section 75. The Judge has no power under the act to allow answers to be filed after such a lapse of time. Our position is materially changed. Joseph S. Rickards, who must of necessity be a material witness, is dead.

The enlargement of time must be made within three days. There is no discretion afterwards to enlarge it. I admit the time is short, but *ita lex scripta*. If a year had been allowed, could the discretion be exercised after the year had expired? If there had been no discretion allowed to enlarge the time, it

could not have been enlarged, and, being allowed, it must be exercised, if at all, within the time limited in the act, *i. e.*, three days.

The claim was not brought before the Court below or here to show that it is a proper claim. Cites *Sedgwick on Statutes*, 277, 278, to the effect that the Court has no dispensing power as to statutes, even in relation to mere practice. *Clarke on Insolvency*, p. 57; *Bacon's Abridgement*, vol. 2, p. 105. An enlargement means an enlargement within the time originally specified.

As to delay, cites *2 Dowl, N. S.*, 64; *2 C. & J.*, 163; *1 Dowl, P. C.*, 588; *In re Cohn*, which was dismissed on the ground that there was no record made up as required by the act. The petition was improperly headed. It is simply headed —In re estate of W. W. Rickards. It should have been headed in this very matter of the claim of J. S. Rickards against the estate.

Rigby, Q. C.—According to the contention of the appellant if by any accident answers were not put in in three days to objections filed to a claim, it might be of $100,000, the case would be decided in favor of the objections. The Legislature could never have contemplated such a result. The Judge must have the discretion vested in him absolutely.

Mr. Neal, who purchased the estate, says that he has a good defence to the claim. Why does he not then wish to try it. Joseph S. Rickards cannot have been a material witness for Neal. His witness is W. W. Rickards.

Mr. Meagher's rule is taken upon certain papers specified and the other papers on file. Those papers last mentioned are the papers that were before the County Court on a previous motion by Harvey, to obtain payment of the claim, *i. e.*, the claim and the objections. Those papers are not here.

Meagher.—Those papers are not in the rule, and were not before the Judge when he made the order appealed from.

THE COURT.—We are in the dark. There is not a document upon which we can found an opinion. We do not know on what grounds the order was granted.

MCDONALD, J.—We can only decide the bare question whether the time could be extended at all after the expiration of the three days.

Rigby, Q. C.—We ask here for permission if need be to abandon the claim and file a new one.

Meagher.—The Judge below did not allow that.

Rigby, Q. C.—Suppose that claim had never been filed, we could file it. (YOUNG, C. J.—Could it be done after ten years?) It would in that case be barred by the statute of limitations. I would have advised the abandonment of the claim and the filing of a new one, but I thought this the safer course.

Meagher, in reply.—Stale claims are not favored in this or any court. Rickards lived for two years after filing the claim, and yet did not attempt to answer the objections to the claim. As to the other papers required by the Court, they were not before the Court below when granting the order appealed from. The time allowed by the statute is ample, and, even if unreasonable, it is provided by the statute. Even a judgment by default must be moved against within a year. The party here is in no worse position than a defendant against whom a default has been standing for a year.

Mr. Harvey has a remedy against Mr. Neal, under his agreement to pay forty-five cents on claims against the estate. The delay may have been designed, to allow the witnesses to die.

YOUNG, C. J.—It must be a reasonable delay; four or five years is unreasonable.

MCDONALD, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

John H. Harvey is the assignee, under the Insolvent Act of 1869, of Joseph S. Rickards, now deceased, who was a creditor of the estate of W. W. Rickards, also an insolvent, and who proved his claim as such, and filed it with W. H. Fielding, the assignee of W. W. Rickards, under the Insolvent Act of 1869. On the 31st day of May, 1873, Messrs. Neal, White & Co., purchased from the assignee of W. W. Rickards the entire estate of that insolvent for a dividend of forty-five cents on the proved claims. In the month of October, 1876, and after the death of Joseph S. Rickards, Mr. Harvey, his assignee, obtained an order *nisi* from the Judge of the Insolvent Court, requiring Mr. Fielding, assignee of W. W. Rickards, to pay him a dividend on the claim filed.

On the hearing it appeared that objections had been previously filed in the lifetime of Joseph S. Rickards by William H. Neal, on behalf of the firm of Neal, White & Co., to which objections no answer was put in. Harvey says that this is the first time he knew of the existence of such objections; but the rule *nisi* was discharged. On the 11th day of November, 1877, the Judge granted a rule *nisi*, calling upon the assignee of W. W. Rickards and William H. Neal, to shew cause why Harvey, assignee of Joseph S. Rickards, should not withdraw the claim filed by Joseph S. Rickards, and file another claim instead, or be at liberty to file answers to the objections filed; and on the 8th day of February, 1878, an order absolute passed that Harvey, the assignee of Joseph S. Rickards, be permitted within fifteen days to file and serve answers to the objections filed; and that the contestant should have a like time to reply. From this order, Fielding, the assignee, and W. H. Neal appealed to this Court, and the question now is whether or not the learned Judge ought to have made that order. It must not be forgotten that at a meeting of the creditors of W. W. Rickards, in May, 1873, objections were made against the claim of Joseph S. Rickards, and were duly served and filed. At that time, and until the first day of September, 1875, two years and four months, the Insolvent Act of 1869 continued in operation, so far as the law relates to this case, and it gave no power whatever to the Judge to enlarge the time for putting in answers to objections, but gave that power to the assignee, exclusively. The Insolvent Act of 1875, sec. 95, takes that power from the assignee and transfers it to the Judge. It gives the claimant three days after the filing of the objections to answer the same, which time may, however, be enlarged by the Judge, with a like time to the contestant to reply. It is contended that the order for extending the time should have been made within the three days given by the statute, and a very recent case was cited in support of that contention, *Wilberforce* v. *Selton*, L. J. R., p. 28, C. P. Division; but it is quite different from this. There the question was whether the County Court Judge, after having delivered his judgment on the 18th day of April, might allow it to be treated as if delivered a fortnight later, so as to enable one of the parties to appeal, as if

within the eight days prescribed by the statute, the statute itself not giving him power to extend the time at all.

By the 37th section of the English Common Law Proceedure Act, it is provided that no appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the Masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge. But in *Ward* v. *Lumley*, 5 H. & N., 656, it was held that the further time *may* be allowed upon application made after the four days have expired, and the Court will grant it in a clear case, (*Kelner* v. *Baxter et al.*, L. R., 2 C. P., 174; *Day's C. P. A.*, 242.) Acting on this authority, I have on more than one occasion enlarged the time for appealing from our decision to the Supreme Court of Canada; and I believe His Lordship the Chief Justice did the same, after the time limited by the statute had expired. I am of opinion that the Judges of the Insolvent Court possess the same power and ought to exercise a sound discretion in the same way; and, more particularly, as the time limited by the act is so short that, if that power did not exist, great injustice would necessarily result in many cases. But the application for enlarging the time in this case was not made until after the lapse of over four years and five months after the time at which the same application might, and if desirable, ought to have been made to the assignee; and I do not think that the Act of 1875, which for the first time gave the power here exercised, ever intended that the Judge should do that which, if done at all, could and should have been done, not by a Judge, but by the assignee, more than four years previously. I think it is impossible for us to uphold such an order. After the lapse of that time, the death or absence of witnesses, the destruction of written evidence, and many other considerations might combine to make it profitable for one party to file answers, which, if filed within a reasonable time, could be met and defeated by the oath of living witnesses and by other evidence no longer available. And in this case we have the fact that Joseph S. Rickards, one of the insolvents, and no doubt an important witness, died between the filing of the objections and the application for time to answer.

While, therefore, I hold that since the Insolvent Act of 1875 came into operation, a Judge of the Insolvent Court should, and can exercise a sound discretion in enlarging the time for putting in answers to objections after the expiration of the three days prescribed by the statute, (which does not limit the time within which that power can be exercised,) I am of opinion that he should do so only within a reasonable space of time, and before any alteration in the position of the parties, relating to the case, had occurred, and I think that the order appealed from must be set aside.

FRASER *v.* McARTHUR.

PLAINTIFF obtained a garnishee order which was made absolute on the 18th of June, without notice to the defendant, to attach the salary payable to defendant as school teacher in the town of Pictou, for the quarter ending August 1st.

Held, that there was here no debt, but only a portion of a salary, and that salary not attachable under the English rule and the policy of the provincial statute; and that as the rule of 18th June had been passed without notice to the defendant and without argument, it must be rescinded with costs.

THE defendant in this action was a teacher in one of the public schools of the Province, and the plaintiff, after judgment, obtained, under chap. 94, R. S., a garnishee order against the town of Pictou for a certain amount of defendant's salary, then accruing due, but not payable. A rule *nisi* was granted by His Lordship the Chief Justice to rescind the garnishee order, and argued December 16th, 1878, before YOUNG, C. J., DESBARRES, McDONALD and JAMES, J J.

Henry, in support of rule.—The affidavit on which the garnishee order was given alleged that Mr. Elliott, Town Clerk, and Mr. Davies, Mayor, had moneys belonging to the defendant, while the garnishee order made the town the garnishee.

The salary of a school teacher, consisting in part of provincial moneys, cannot be garnisheed.

YOUNG, C. J.—Certainly not.

Rigby, Q. C.—A single judge cannot give an order *nisi* to set aside a judgment of the Court. If he could do that, he could give an order absolute. Our statute gives no such authority, and nothing of the kind is known in England. *Jones* v. *Perry*, 3 Dowl., 699; *Ch. Arch.*, 1598.

YOUNG, C. J.—It would make a great difference in our practice, if we established that. We think a teacher's salary is not subject to attachment.

Rigby, Q. C.—A single judge has power simply to give a rule for a stay of proceedings till the party can move the Court. It is now a mere question of costs. We do not oppose the setting aside of the garnishee order. *Tidd's Practice*, 511; *Russell on Awards*, 634.

Henry.—We are content to consider this a new application and tax for it, provided we are allowed for all necessary papers. We have, at all events, given notice in our rule *nisi* of this application.

SIR WILLIAM YOUNG, C. J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

On the 5th of June last, the plaintiff, a tailor at New Glasgow, recovered a judgment for $159.39 against the defendant, one of the common school teachers with a salary of $600 a year in the town of Pictou. Under the Act of Incorporation, Mr. Davies is the Mayor and Mr. Elliott the Clerk, and the defendant's salary had to be paid out of the town funds, and had been paid to him for the quarter ending May 1st. On the 13th June, the plaintiff swears to his belief that Mr. Davies, the Warden, he calls him, and Mr. Elliott, the clerk, of said town, are indebted to the defendant, and have money in their hands under their control due or accruing due to the defendant, and thereupon obtains from the Court a garnishee order, which is made absolute on the 18th June without notice to the defendant, who finds his salary due on the 1st August, his only means of subsistence, he says, for himself and family, attached to pay this debt. In both rules the town of Pictou is described as the garnishee, which of itself is an irregularity, and I had no difficulty in granting a rule *nisi* at Chambers on the 18th July, returnable to the Court in term setting aside

the garnishee order upon argument, staying proceedings thereon in the meanwhile.

A similar case came before me at Chambers about two years ago, and I decided that a school salary could not be attached, even when due, much less when only accruing. The Educational Act, chap. 32, sec. 76, sub-sec. 1, directs the inspectors to deliver to licensed teachers personally, or upon their written orders, their provincial allowances and drafts upon the county or district treasurer. Inspectors, therefore, cannot pay these allowances on a garnishee order, without contravening a wholesome provision in the Act.

As regards the word *accruing* in the Garnishee Act, both in England and our own Province, *Archbold* says, 713, note *m*, that it can be only applied to a *debitum in præsenti, solvendum in futuro*, and *Day* says in his Common Law Procedure Act, 266–7, that a debt is attachable which is due, but not payable until a future time, and that the mere probability of money becoming due, as in the case of accruing salary, is not attachable as an accruing debt. For the first of these positions he relies on an Irish case,—for the second, on the practice of the Court.

It is obvious that where the debt is not payable, the order in section 285 of our act must be modified. In an English case at Chambers, reported in 61 Law Times, 158, where the affidavit for a garnishee order stated, "that the debt was owing and accruing," the Judge said; "I will make the order, but the attachment must be confined to that part of the sum which is stated in the affidavit to be accruing at the time of the judgment." And in the case of *Tapp* v. *Jones*, in 1875, L. R., 10 Q. B., 591, where writs of execution were taken out against the garnishee for a debt payable by instalments, the Court said, after referring to the difference between the two sections of the Act, (being the 283rd and the 285th of ours,) "it is quite clear that the garnishee cannot be bound to pay his debt before it is due, so that we must read "the debt due" as meaning either the debt when due or the debt then due. The true construction is that there is power to make an order against the garnishee for payment of his debts, as and when they become payable, instead of making a fresh order as each falls due." Both executions were, therefore, upheld.

But here there was no debt, there was only a portion of a salary, and that salary not attachable under the English rule and the policy of our statute.

As the rule absolute was passed by the Judge at Pictou, at the instance of the Town Clerk, without notice to the defendant and without argument, the proper course will be to rescind the rule of the 18th June last, with costs.

SUMNER ET AL. *v.* BARNHILL, EXECUTOR.

AWARD set aside on the ground that one of the arbitrators was disqualified, having been regularly retained as solicitor of the estate of which the defendant was the executor, although said arbitrator had not been engaged as counsel or attorney in the matter referred, and did not concur in the award.

THIS was an application to set aside an award on the grounds chiefly of misconduct on the part of the arbitrators, and that two of the three arbitrators, Mr. Gourley and Mr. Longworth, were disqualified, having been regularly retained solicitors or attorneys of the defendant, in whose favor the award was made. The rule was argued this term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J.

Rigby, Q. C., in support of rule.—There is undisputed evidence in the affidavits before the Court of what amounted to legal misconduct on the part of the arbitrators. They declined to receive evidence that should have been received and its weight left to their after consideration. The affidavits shew that two of the arbitrators were the regularly retained solicitors of the defendant.

Graham, contra.—The arbitrators are judges of the law, and the Court will not review their decision, unless the error appears on the face of the award. *Russell on Awards*, 288; *5 M. & S.*, 504; *10 C. B., N. S.*, 661. It is a question whether the arbitrators were not right on the point referred to. Plaintiff put in a certain paper, an account from an executor, as the best evidence he could produce; it is questionable whether he could do so.

As to the disqualification; the principle contended for would disqualify every Judge for years after he went on the bench, every time a former client came before him. The interest of the arbitrator must be secret, to prejudice the award. *LeBlanc* v. *McRae*, 2 R. & C., 240.

Eaton, in reply.—The appointment of the arbitrators was not by consent, they were appointed by a Judge. The fact that an award is so much more binding than a verdict of a jury or a judgment of a single Judge, should make the disqualifications more exacting. One of the arbitrators, Mr. Longworth, was the regular proctor of the Pearson estate. The fact that he did not join in the signing of the award does not affect the question; he was present at the hearings. Mr. Gourlay is shewn by the affidavits to have been the solicitor of and on account of the executor; intimately connected with some of the legatees. *Russell on Awards*, 103 & 646; *2 Dowl. & Ryl.*, 168; *7 Beav.*, 455; *3 H. of L. C.*, 759; *18 Q. B.*, 416; *L. R., 2 Ch. Div.*, 113; *1 Giffard*, 258; *2 Ves. Sen.*, 316; *2 Atkyns*, 395; *2 M. & Gr.*, 847.

The rejection of the evidence to vary the accounts put in was wrong.

(YOUNG, C. J.—The case is analogous to that covered by the section of our Practice Act, which enacts that where you adopt one side of your adversary's particulars, you adopt the other.)

It has been said that this mistake should appear upon the face of the award in order to be brought before the Court; but a mistake of this nature could not appear on the face of the award.

SIR WILLIAM YOUNG, C. J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

The plaintiffs, doing business at Moncton, in New Brunswick, having brought an action in 1875, claiming a balance of $2,804.26, against the defendant, as executor of Fred. M. Pearson, who did business in Colchester, and was an insolvent at the time of his death, the suit was referred, in 1876, to Messrs. Foster, Longworth and Gourlay, two of whom found an award, in June, 1878, for $4,033.67, in favor of the defendant. A rule *nisi* was granted to set it aside on various grounds which were

argued during the present term. There was great difficulty in adjusting the reference, not less than a dozen arbitrators having been named, and the above three at last appointed by the Judge, with the assent of the parties or their counsel. When Mr. Sumner and Mr. Rigby, acting for him, came to Truro to attend the reference, they learned for the first time that Messrs. Longworth and Gourlay had been long and closely connected with the family and estate of Pearson, and they protested against their acting on that ground. Mr. Eaton also, the attorney of the plaintiff, declares that he was equally ignorant of these facts, and, having made subsequent inquiries, he goes into them in detail. Those in respect to Mr. Gourlay are of less consequence, and are for the most part explained, but still show a very intimate connection, which no prudent counsel, knowing it, would have overlooked when brought to his knowledge, on behalf of the plaintiff. As regards Mr. Longworth, Mr. Eaton says that Pearson's will appointing defendant his executor was drawn by and is in the handwriting of Mr. Longworth, and that he is one of the witnesses thereto and proved the execution thereof, and the appraisement on file in said estate is also partly in his handwriting, and, as said deponent verily believes, he has ever since the death of said Pearson been and acted as the proctor, solicitor and legal adviser and conveyancer of the defendant in his capacity as such executor. Mr. Longworth, in his reply, denies none of these allegations and simply states, what no one who knows him would question for a moment, that he had no pecuniary interest in the result of the suit, nor had been retained as counsel or attorney therein by the defendant, nor was indebted to him as such executor. Another objection in the rule *nisi* was the rejection of the plaintiff's evidence as to certain errors in accounts rendered by Pearson in his lifetime and which Sumner was obliged to produce, and, on such rejection by the arbitrators he and his counsel withdrew from the reference and the award was made, Longworth, for reasons that are not explained, declining to concur therein.

The grounds of the award do not at all appear, nor is there any imputation whatever, nor misconduct alleged on the part of the arbitrators. The rejection of the evidence may have

been an error in judgment on which I forbear from expressing an opinion, the main point we have to decide being the alleged incapacity of two of the arbitrators to act as such. This is of the more consequence on account of the largely increased authority of arbitrators under modern decisions, and the reluctance to set aside awards when good upon the face of them. This principle, originally founded upon the fact of the parties having selected their own judge, seems to have been extended to compulsory references under the statute, and to arbitrators appointed thereunder by a judge. In *Bagallay* v. *Borthwick*, 10, C. B., N. S., 64, ERLE, C. J., said; "It has been laid down that a compulsory reference under the act confers the same powers, and imposes upon the parties the same liabilities, as in the case of an ordinary arbitration, where the arbitrator is selected by the parties themselves." In *Fuller* v. *Fenwick*, 3, C. B., 710, WILDE, C. J., said; "There are numerous decisions," (of which a long list is given,) "showing that the Court will not withdraw the matter from the judge whom the parties have themselves selected. It is always competent to reserve points of law for the opinion of the Court, if the parties choose so to stipulate, rather than confide in the judgment and discretion of the arbitrator. Formerly the courts were in the habit of setting aside awards for misreception or improper rejection of evidence by the arbitrator, but of late it has been clearly settled that the decision of the arbitrator in this respect is final." See also *Emmerson* v. *Simpson*, Russell on awards, 290. In *Hall* v. *Hinds*, 2 M. & G., 847, the arbitrator himself admitted that he had made a mistake in the award, but, there being nothing on the face of the award to show the mistake, the Vice Chancellor, 27 L. T. R., N. S. 439, doubted whether that case would be adhered to now. And yet the mistake was obvious and palpable. In *Moseley* v. *Simpson*, 28 L. T. R., N. S., 729, Vice Chancellor MALINS entirely subscribed to Chief Justice COCKBURN'S judgment in re *Hopper*, L. R. 2 Q. B., 367, 15 L. T. N. S., 566, in which he says; "I would observe that we must not be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings."

Arbitrators being armed with such powers it is essential that they should be free of all reasonable exceptions. *Caldwell on arbitrations*, 37 to 39, cites the old cases, some of which are curious enough, as in that of Sergt. Hards, *4 Mod.*, 226, where the Archbishop of Canterbury being plaintiff in a case of deodand, which was referred to him by consent, his award for himself was attacked on the ground of interest, but upheld. See also *2 Vern.*, 251. The modern cases are in *Russell* 101–3, affirming the general principle that an arbitrator ought to be a person who stands indifferent between the parties, and that any concealed or unknown interest or bias will disqualify him. The rule is well expressed in *Kemp* v. *Rose*, 1 Giff., 258; "a perfectly even and unbiassed mind, said the Vice-Chancellor, is essential to the validity of every judicial proceeding. Therefore where it turns out that, unknown to one or both of the parties who submit to be bound by the decision of another, there was a circumstance in the situation of him to whom the decision was entrusted, which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court." See also *Harvey* v. *Shelton*, 7 Beav. 462–4. It is of no consequence that Mr. Longworth has not joined in the award. He sat upon the reference and was there as a judge, and, without at all questioning the purity and conscientiousness of his action, I am of opinion, that, as the solicitor of Pearsons' estate and the adviser of the executor quite independently of this case, he was not competent to act as one of the arbitrators thereon, and, the fact being unknown to the plaintiffs, their attorney and counsel, that the award should be set aside and the rule *nisi* made absolute with costs.

GRAY *v.* THE STEEL COMPANY OF CANADA.

On an equal division of the Court, the modern practice seems to be that the party who has obtained a verdict, as a general rule retains it, that the Court has a discretionary power to order a new trial or reargument, that the Court may refuse the costs of argument where neither party prevails, and that on appeal from inferior tribunals the decision below is affirmed.

On this cause coming up for decision last term, it was found that the Court was equally divided. Plaintiff's counsel contended that in such a case the verdict, which was for plaintiff, must stand; but defendants' counsel contended that no judgment could be entered up. The point, being a new one, was directed to be argued, and an argument was had last term.

Rigby, Q. C., for plaintiff.—His Lordship the Chief Justice was of the opinion that no judgment could pass in this cause, and that the decision was tantamount to a stay of proceedings. I think it is true there can be no judgment on the rule *nisi*. But the result is that the proceeding next below stands confirmed, as if there had been no rule at all. In England, where the Lords are divided, the maxim, *præsumitur pro negante*, gives respondent a judgment on which he taxes his costs. In Common Law courts no judgment is entered, but the judgment appealed from stands affirmed. In the case of a verdict the costs are taxed on the verdict, but no costs of argument, and the rule drops.

Refers to *Tidd*, 930. The object in the case cited there was to give the parties an opportunity to appeal on the point on which the Court was divided; one of the Judges offered to withdraw his judgment for that purpose.

1 Salk., 16; *7 Taunt.*, 489; *1 Camp.*, 467. There there was a non-suit and the Court was equally divided, and the Chief Justice said there could be no order, and the non-suit must stand. *3 El. & Bl.*, 134, 722; *L. R., 1 Ap. C.*, 713, 750; *L. R., 2 C. P.*, 125; *Law Journal for October 1877*, 675; Lives of the Chief Justice's by *Arnold*, Vol. 6, 189; *10 Cl. & Fin.*, 906, 907; *Fisher*, 6138.

Ritchie, Q. C., contra.—I think where the Court is divided, where the motion is made for instance for arrest of judgment, if it is contested in the first instance and the Court is divided,

then the judgment below is confirmed; but if there is a rule *nisi*, or anything equivalent to that, the matter may be disposed of. Cites *3 Mod.*, 156; *1 Salk.*, 17. The case in *Salkeld* is better reported in other books. See *1 Lord Raymond*, 495, and *12 Mod*, 269. The next cases are *1 Camp.*, 468; *7 Taunt.*; *Burrough's Judgment*, p. 567. The course suggested there would not have been necessary if the rule were such as contended for by the other side, for plaintiff would have had judgment. In *3 El. & Bl.*, 146, the Court being equally divided the rule dropped. *Ib.*, 722. There is nothing there to show that defendant was entitled to general costs.

Levy v. *Green*, 4 Jurist., 86, also in *8 El. & Bl.*, 969; *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El., 508. There plaintiff got a verdict. On the rule *nisi* to set it aside the Court was equally divided. The Court said the rule would, in strictness, drop, but they would suggest that the junior Judge would withdraw his judgment and let judgment go for defendant, so that plaintiff might appeal. Cites *Barss* v. *Strong*, (unreported.) The plaintiff is bound to make out his case. He cannot be said to do so if the Court is equally divided.

Meagher, in reply.—The first ground taken by *Mr. Ritchie*, defendants' counsel, illustrates the very distinction on which we rely. He says if there is a rule in arrest of judgment, no further proceedings can be taken. That is because the rule in arrest of judgment is a stay of proceedings, and they cannot discharge the rule. The Court admit in *1 El. & El.*, 969, that "in strictness the rule would drop." That is, *in law* that would be the result. See *Day's C. P. A.*, 286, (lib. ed.,) sec. 34. *Levy* v. *Green* was decided after that section. In that case plaintiff had a verdict. The Court being equally divided, the rule dropped, and the question was whether that was such a discharge or making absolute of the rule, as enabled the party to appeal under that section. The rule dropping means that there is no successful party upon that rule. It does not mean that there is none on the whole case. See particularly note in *4 Jurist.*, (cited contra.) That decision shows that the effect of the rule dropping is that the rule is discharged.

In the case in *3 El. & Bl.*, there was a taxation, which fact shows that effect was given to the verdict, otherwise there

could have been no taxation, and the rule to review the taxation was made absolute to strike out the costs of the rule *nisi*, which could not be taxed, as *on that rule* no one was successful. Cites note to *3 El. & Bl.*, 721.

SIR WILLIAM YOUNG, C. J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

The plaintiff having obtained a verdict for $950, on a rule *nisi* for setting it aside, the Court were equally divided in opinion, and we have now to settle the practice thereon in this and the like cases. We have hitherto refused to give judgment in the cause, for which we had ample authority. *Tidd*, 9th edition, 1828, fol. 930, says that when the Court are equally divided in opinion no judgment can regularly be entered; and he cites *1 Salkeld*, 17; *1 Campbell*, 468, but does not cite, *6 Modern*, 155, contra. In *Chitty's General Practice*, 3–19 published in 1835, it is said: "If the Court should be equally divided, as two for and two against a rule for a new trial or other proceeding, then there can be no rule, order or judgment;" and the practice is referred to of one of the Judges withdrawing his opinion, as in *7 Taunt*, 489, that there may be an appeal. In 1846, however, in *Coxhead* v. *Richards*, 2 C. B., 610, and in *Bennett* v. *Deacon*, 2 C. B., 632, where, on a rule for a new trial, the Court were equally divided, the rule in each case fell to the ground and the defendant in one and the plaintiff in the other retained his verdict. In *6 Arnold's Chief Justices*, 187, it is said, in a note referring to the year 1848, that where the Court in which a rule is moved is equally divided in opinion the practice is that the rule is discharged. In *Lyde* v. *Barnard*, 1 M. & W., 124, the Court being equally divided in opinion, the Chief Baron said the effect would be that the rule would be discharged; but, the question being one of much importance, the Court are disposed to allow the defendant to have a new trial on payment of costs, in order that he may have an opportunity of raising the question on the record for the opinion of a court of Error. In *Dansey* v. *Richardson*, 3 El. & Bl., 144, there was a verdict for the defendant, and, the Judges being equally divided, the rule for a new trial dropped; and Lord CAMPBELL, in the same case, 722, remarked that there was no decision and no successful

party, and the costs of the rule were disallowed to the defendant. In *Levy* v. *Green*, 8 El. & Bl., 575, the plaintiff had a verdict, and, on motion for a non-suit, the Court being equally divided, the rule dropped. In this case it was held that the party who obtained the rule might appeal. In *Bennett* v. *Allen*, 4 Jurist., N. S., 488, on motion for a new trial, the Court, instead of allowing the rule to drop, being equally divided, discharged it in order to enable the parties to appeal; *Fisher's Digest*, 6138. In *Bishop* v. *Bedford Charity*, 1 El. & El., 712, the Court was equally divided in 1859 on a rule to enter a non-suit, and said that in strictness the rule would drop, but they thought it the better course for the junior Judge to withdraw, so that judgment should pass for the defendant and the plaintiff might appeal. In *Jackson* v. *Metropolitan R. R.*, Weekly Notes, 1877, the plaintiff had a verdict which the Common Pleas refused to set aside. The Court of Appeal were equally divided, and the judgment of the Common Pleas stood affirmed, but the House of Lords reversed it. In *33 L. T. R., N. S.*, 665, on an appeal from the Quarter Sessions, the Court of Queen's Bench being equally divided, the order remained in force. In the House of Lords, *(10 Cl. & Fin.*, 906,) and in the Supreme Court of the United States, *(7 Wallace*, 107,) on an equal division the judgment below is affirmed. But such decisions, says *Story*, in his *Equity Pleadings*, 8th edition, 7936, are not generally reported and are not regarded as of any authority in other cases.

By the practice of the Supreme Court of New Brunswick, on an equal division the rule for a new trial drops; *2 Allen*, 477, where the old cases are reviewed; *1 Pugsley*, 72. See also *Ram's Legal Judgments*, 49–51; *40 U. C. Q. B.*, 345. From these decisions the modern practice seems to be that, on an equal division, the party who has obtained a verdict, as a general rule, retains it, and has judgment; that the Court has a discretionary power to order a new trial or reargument, which last is the rule in the New York code of procedure, sec. 14, and is said to be merely declaratory of the Common Law rule, *3 N. Y.*, 347; that the Court may refuse the costs of argument where neither party prevails; that, on appeal from inferior tribunals, the decision below is affirmed.

The case in hand was tried by Judge WILKINS, and he and Judge MCDONALD were for the plaintiff, and the Chief Justice and Judge SMITH for the defendant. Under all these circumstances, we direct that the cause shall be re-argued, and, at the instance of the parties, may be entered on the docket for the present term. There will be no costs on the first argument.

JENKINS *v.* STERLING.

DEFENDANT held a mortgage of certain property in the possession of the mortgagor, and agreed, by letter prepared by the plaintiff although signed by the defendant, to sell to the plaintiff all the interest and title of defendant to said premises, with all securities, collateral or otherwise, held by said defendant in respect of said mortgage; also, a certain policy of insurance, &c., &c., the defendant guaranteeing good title, and that said mortgage was the first incumbrance, &c. Afterwards, plaintiff having given the defendant his check for $500, on account, the defendant signed a receipt substantially in these terms; "Received from T. K. Jenkins, the sum of $500, on account of the purchase of all my interest and title in the mortgage on Stephen property. * * I have sold said mortgage of $8000, together with the securities, collateral or otherwise held by me, * * * and half the interest of the adjoining property south, and insurance policy and receipts on said property, and all other securities * * * balance to be paid as soon as possession is obtained by T. K. Jenkins." The Court, having under a rule power to draw inferences as a jury might do, held that the possession referred to in this agreement was possession of the securities mentioned, and not of the land, and they non-suited the plaintiff in an action of damages against defendant for not performing his agreement by delivering possession of the land.

THE question in this cause turned mainly upon the construction of the following agreement: "Received from Thomas K. Jenkins the sum of $500 for and on account of purchase of all my interest and title in the mortgage on the Stephen property, situate at Freshwater and owned by James White. I have sold the said mortgage of $8,000, together with all securities collateral and otherwise held by me; also the life policy and receipts of James White's life for $10,000, and bond of Neal, White & Co., for said mortgage for $——, and half the interest in the adjoining property south, and insurance policy and receipts on said property, and all other securities to Thomas K. Jenkins for the sum of $6,000, he having given me a bond yesterday, the 3rd instant, covering any loss—at the purchase of $6,000, which amount was then to have remained on mortgage at interest; but since then have accepted the within sum of $500 on account of the purchase, being $6,000, the balance to be paid *as soon as possession*

is obtained by T. K. Jenkins. This check will be returned in case satisfactory arrangements are made with Neal, White & Co., by T. K. Jenkins to lease the premises.

(Signed) DAVID STERLING."

The principal question in the suit was as to the meaning of the words italicized, and whether they referred to possession of the securities or possession of the land, plaintiff contending that he was to receive not only possession of the papers, but possession of the property. Defendant contended at the trial that the possession referred to in the agreement was only possession of the securities mentioned therein, and he tendered evidence to explain what his counsel contended was a latent ambiguity, which was rejected.

A nominal verdict was entered for plaintiff, and a rule granted to set it aside, which was argued this term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD, and JAMES, J J.

The *Atty. General* and *Lynch, Q. C.*, for defendant, contending that there was a latent ambiguity, cited *Story on Contracts*, s. 671; *1 Greenleaf on Ev.*, 288.

Rigby, Q. C., and *Tupper*, contra, cited *L. R.; 5 P. C.*, 219; *Taylor on Ev.*, 1195; *2 R. & M.*, 699; *7 C. B. N. S.*, 861.

The *Atty. General*, in reply, cited *Greenleaf on Ev.*, sec. 277, n. 2; *5 M. & W.*, 535; *2 Parsons on Contracts.* 13, n. *r.*; *1 Exch.*, 154; *2 F. & F.*, 722; *3 Gray*, ——; *100 Mass.*, 63, 61; *7 C. B., N. S.*, 323; *15 M. & W.*, 561; *8 C. B.*, 59; *9 Cl. & F.*, 566.

DESBARRES, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

This was an action brought on an agreement in writing made between the plaintiff and defendant, dated 19th March, 1877, whereby the defendant, being the holder of a mortgage for $8000, made to him by James White and his wife, of certain lands and premises, of which the mortgagor was then in possession, agreed to sell to, and the plaintiff agreed to purchase from the defendant for and in consideration of $6000, all the interest and title of defendant to said premises, with all securities collateral or otherwise, held by said defendant in

respect of said mortgage, and also a certain policy of insurance on the life of said James White for the sum of $10,000, together with the bond of Neal, White & Co. for $, the said defendant guaranteeing good title, and that the said mortgage was the first incumbrance on said property. On the 4th April, 1877, the plaintiff paid the defendant the sum of $500, for which the defendant gave the following receipt of that date; "Received from Thomas K. Jenkins the sum of five hundred dollars for and on account of purchase of all my interest and title in the mortgage on the Stephen property, situate at Freshwater and owned by James White. I have sold the said mortgage of $8,000, together with the securities collateral or otherwise held by me, also the life policy and receipts of James White's life for $10,000, and bond of Neal, White & Co. for said mortgage for $, and half the interest of the adjoining property south, and insurance policy and receipts on said property, and all other securities, to Thomas K. Jenkins, for the sum of $6000, he having given me a bond yesterday, the 3rd instant, covering any loss at the purchase of $6,500, which amount was then to have remained on mortgage at interest, but since then have accepted the within sum of $500 on account of the purchase, being $,6000, the balance to be paid as soon as possession is obtained by T. K. Jenkins. The check will be returned in case satisfactory arrangements are made with Neal, White & Co. by T. K. Jenkins to lease the premises." On the 11th April, 1877, the defendant, through Donald Keith, his agent, addressed a letter to the plaintiff requiring him to pay the sum of $5,500 balance due on the agreement for purchase of said mortgage, and notifying the plaintiff that, unless payment of the amount demanded was made on the following day, he would look on the transaction as at an end, and proceed to make other arrangements in reference to the same.

The plaintiff, in his evidence in this cause, states that he called upon Keith, the agent of the defendant on the following day, and, on informing him that he was prepared to make arrangements for the payment of the money, they both went to an attorney to get the necessary transfers of the documents prepared. These documents, on being prepared, were left with the plaintiff to be examined, who returned them, saying,

"they were all right," but that he would not pay the money until he got possession of the property. The assignments and transfers of the respective documents so submitted to and examined by the plaintiff were then executed by Keith, as the attorney of the defendant, and tendered to the plaintiff, together with the original papers, and the balance remaining due to defendant on the purchase was then demanded of the plaintiff, who refused to receive them or pay the money, without, at the same time, receiving possession of the mortgaged premises, as previously intimated. Keith, in his evidence, states that he then declared the transaction to be at an end, and gave back to the plaintiff his cheque for $500, which had been previously received by the defendant on account of the purchase money under the contract. It appears that Neal, the mortgagor, two or three days after the tender made to the plaintiff of an assignment of the mortgage and collateral securities held by defendant, paid up the full amount due on said mortgage, and the plaintiff, insisting that he was entitled to receive, and that the defendant was bound to deliver to him, the possession of the mortgaged premises, as well as an assignment of the mortgage and other securities, and that the non-delivery of such possession was a violation of the contract, has brought the present action, in which he seeks to recover from the defendant the difference between the amount that was due on the mortgage and the sum he agreed to pay on the assignment, and also a large sum for loss alleged to have been sustained in consequence of non-performance of the agreement.

At the close of the trial lately had before the Chief Justice, it was agreed by the counsel of both parties that a verdict should be entered for the plaintiff, and that the case should be remitted to the full Court, with power to direct the amount to be paid to the plaintiff, or a non-suit, with costs, the parties to be entitled to take all objections arising out of the evidence and minutes, and the Court to draw the same inferences from the facts in proof, as the Judge on trial or a jury might do. If the case had rested upon the defendant's letter to the plaintiff of 19th March, 1877, as alone furnishing proof of the nature of the agreement entered into between the parties, there would have been no difficulty in disposing of it; but

the receipt of the 4th April, 1877, contains certain words not embodied in that letter, which must be read and taken in connection with it as forming part of the agreement entered into, and upon which the action was brought; viz., "the balance to be paid as soon as possession is obtained by Jenkins." These words, the plaintiff contends, are to be understood as applying to the delivery of possession to him of the premises mortgaged, while the defendant insists that the words apply to the delivery of the mortgage and collateral securities, as soon as they were, or could be, assigned and transferred to the plaintiff, and not to the land mortgaged, which was, at the time, in possession of the mortgagor, from whom it could not be obtained without instituting coercive proceedings.

In interpreting these words, we must endeavor to ascertain what were the real object and intention of the parties in entering into this agreement, and, in view of the surrounding circumstances, give to it that construction that may seem to us best to effectuate that intention. To that end, and in order to get at a right understanding of the agreement, we must look at the position in which the parties stood at the time it was made. The defendant was the mortgagee for $8,000 of property in this city, holding therewith the collateral securities already described, all of which he was willing and agreed to sell to the plaintiff, for the sum of $6,000. The plaintiff, either with the view of becoming the possessor of the property or making money on the speculation, agreed to purchase, and pay the sum named, on assignment of the mortgage and collateral securities, so as to vest in the plaintiff the same legal right therein that the defendant himself possessed. If this is the purpose of the agreement, as may reasonably be assumed, it would be consistent with the ordinary dealings of business men with each other in like cases. But the plaintiff contends that the agreement imposed a duty on the defendant beyond the mere assignment of the mortgage and collateral securities, insisting that it was imperative upon him, besides the usual assignments, to deliver up to him, the plaintiff, the possession of the mortgaged premises at the same time; in other words, that the plaintiff was under no obligation to pay the money until the defendant delivered to him the possession of the mortgaged premises, or rather, did an act which he had

not the power of performing, even if he desired to do so. If such is the true construction and meaning of this agreement, the plaintiff is entitled to recover, but it is a construction which, though the words to be interpreted are ambiguous, I cannot, under the circumstances of this case, bring my mind to believe to be the true one. It is worthy of observation that, in the letter to the plaintiff of 19th March, 1877, in which the defendant accepts the plaintiff's offer to purchase the mortgage which he held from James White for $6,000, together with all the collateral securities relating thereto, not a word is said as to the delivery of possession of the mortgaged premises to the plaintiff, though it contains a guarantee of good title and of the mortgage being the only incumbrance on the property. This letter, though signed by the defendant, is admitted to have been prepared by the plaintiff, and the fact of its being silent as to the delivery of the possession of the property by defendant, goes far to show that, at the time, the delivery of such possession was never contemplated. It is true, the words we are called upon to interpret may be taken to mean the possession of the mortgaged premises; yet, when reading them in connection with the words in the next and last paragraph of letter "A," (the receipt of 4th April,) which refers to an arrangement to be made by plaintiff with Neal, White & Co. to lease the premises, I find it impossible to satisfy my mind that such is the meaning to be given to them.

Looking at the language of the contract and the circumstances connected with it, in order to discover the meaning it was intended to have by the parties who made it, I have arrived at the conclusion, not, I confess, without some doubt upon the subject, that the possession to be obtained by the plaintiff was the possession of the mortgage itself, together with the collateral securities belonging to it, regularly assigned and transferred to vest in him all the right and title which the defendant had thereto, thus placing him in the same position that defendant occupied, and leaving him, as the assignee, to deal with the securities as he might think best, to accomplish the object he had in view. Having refused to accept the assignment of the mortgage and collateral securities accompanying it when tendered to him, and to pay the money mentioned in the contract, I think the plaintiff has made out no

case against the defendant, and that a nonsuit ought, therefore, to be entered, with costs.

SIR WILLIAM YOUNG, C. J., said that the whole Court concurred in the judgment just pronouced, which proceeded upon the weight of evidence.

LONGLEY ET AL. *v.* NORTHERN INSURANCE CO.

PLAINTIFFS brought action on a policy of insurance, and the jury, in answer to a question whether the claim had been honestly made, replied; "being over-estimated but not with intention of fraud." Butcher, a co-plaintiff, gave very strong evidence to implicate Longley, first as being privy to the destruction of the property, and, secondly, as having made a false and fraudulent claim. The whole evidence, in the opinion of the Court, showed badges of fraud, and, although the jury had negatived intentional fraud in the statement of the claim, their verdict was for only $400, while the claim had been made for $565.06.

Held, that the verdict must be set aside.

On the reading of the minutes it appeared that the rule *nisi* for a new trial had been made returnable in the November term. Objection having been taken, the Court allowed the rule to be amended by substituting "December" for "November," and the argument proceeded.

THIS was a cause tried before SIR WILLIAM YOUNG, C. J., in which a verdict was found for the plaintiff and a rule was taken to set it aside, on the grounds that the verdict was against the weight of evidence, that the verdict was excessive, and that the plaintiff had made fraudulent misrepresentations of the claim. After the reading of the minutes had proceeded some time, *Graham* took an objection to the further hearing of the cause, that the rule *nisi* to set the verdict aside was made returnable in the "November" term. The Court ordered the rule to be amended by substituting the word, "December," for "November," and the argument proceeded. The Judge had put the following question to the jury; "Was the claim of $565.06 in this case honestly made and attested to by Thomas Longley, or was the claim knowingly exaggerated, so as to render it unjust and fraudulent." To this the jury replied; "Being over-estimated, but not with intention of fraud;" and they found a verdict for plaintiff for $400. The Court, upon the reading of the minutes, was so strongly impressed by the evidence that there had been a scheme to defraud the defendant Company, that they did not require defendant's counsel to open, but called upon plaintiff's counsel.

Graham, for plaintiff, contended that, in order to set aside the verdict on the ground of a concocted scheme to defraud the company, the evidence must be strong enough to sustain a verdict for arson, citing *Rice* v. *Prov. Ins. Co.*, 7 U. C., C. P.; *Park* v. *Phœnix Ins. Co.*, 19 U. C., Q. B., 110; *27 U. C., Q. B.*, 473; *34 U. C., Q. B.*, 384; *12 U. C., Q. B.*, 578; *17 U. C., Q. B.*, 341; *1 Bing.*, 339; *4 Bennett's Ins. Ca.*, 1; *2 Id.*, 758; and that there was no evidence at all that would sustain such a finding. On the contrary, the plaintiff had been tried on a charge of setting the place on fire and had been acquitted.

McDONALD, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

This is an action upon a fire insurance policy, and the defendants, among other pleas, pleaded that the plaintiffs presented a false and fraudulent account of the loss, with intent to induce them to pay an unjust and unreasonable amount, and also that the loss was caused by the procurement and connivance of the plaintiffs. These are serious charges, and the evidence must, necessarily, be very strong to support them; but, if they are supported, they are conclusive against the plaintiffs' claim. The plaintiffs, Longley and Butcher, were doing business, as partners, and appear to have had but a limited supply of goods. On the 29th of August, 1875, their shop took fire, and the plaintiff, Longley, says that it was gutted and the stock wholly burnt. The fire appears to have occurred on a Saturday night, and Longley says that he was in the store on that night at 10.15 p. m., and heard of the loss at 8 a. m., Sunday. A claim was put in for $565.06 against the underwriters, and the plaintiff, Longley, says that the loss was about $600, but the jury gave only $400. To a question put by His Lordship the Chief Justice, who tried the cause, as to whether the claim of $565.06 was honestly made and attested to by Mr. Longley, or knowingly exaggerated, so as to render it unjust and fraudulent, the jury replied; "being over-estimated but not with intention of fraud;" and they found in favor of plaintiff $400. We must now see whether that finding is supported by the evidence and is in accordance with law.

It is contended on behalf of the plaintiff, Longley, that, to to justify the setting aside of a verdict like this, the evidence in support of one of the pleas should be so strong as to justify

the conviction of the plaintiff, Longley, for arson, and, under the other plea a conviction for perjury; and the learned counsel cited authorities from the Ontario Law Reports, which, though not binding upon us, are entitled to the highest respect. But I fail to see that his argument derives much strength from those decisions, because the evidence is so strong that, if Longley had been tried under it and convicted under an indictment for either of the offences mentioned, it would be impossible for him to escape punishment. The fact that he was indicted for one of them and acquitted, if fact it be, does not affect this case, which must be decided according to the evidence now before us. The case is different from any that ever came before this Court, and, so far as I know, any case reported, in this respect, namely, that Butcher, one of the plaintiffs on the record and interested like the plaintiff Longley in the result, testifies, against his own interest, implicating Longley, first, as being privy to the destruction of the property, and, secondly, as having made a false and fraudulent claim,—either of which charges, if true, would defeat this action. Longley's own evidence is exceedingly unsatisfactory. He admits that, on the afternoon immediately preceding the fire, he sent to the country without receiving any order therefor, a quantity of goods, part of the insured property. As to the value of the goods remaining in the shop he is contradicted by nearly every witness examined; but the most damaging evidence is that of his partner, Butcher, whose interest in the result of this cause is identical with his own; and the only reason which Longley assigns for Butcher giving that evidence is that he charged the latter, before the fire, with making incorrect returns, a poor reason for declining to receive his share of the insurance money and committing perjury besides. Although the claim was $565.06, the plaintiff Butcher says that he would "not swear that the stock destroyed was worth more than $200,—not more than $300 altogether." He then gives a statement of the stock in the shop on Saturday morning, by which it appears that the value of it was very little. He says that "six weeks before the fire Longley said it would be a good thing if the goods were burnt, and repeated this shortly before the fire." Again, he says; "when he told me about it being a

good thing, I told him he would get into trouble. He thought he could manage it so as not to be found out." He says; "On Sunday he told me the shop had gone up. Same day I saw Longley at his house. He talked about the insurance, and said if we wanted to make a haul it was a good chance and we could do it then." Butcher said he would have nothing to do with it, and that he must do it himself if he made a haul. He says that Longley wanted to know if he would help him out of that scrape, and that he answered he would have nothing to do with it, and that Longley wanted to make out the claim for $1000.

The cross-examination does not improve Longley's position, for the witness says, among other damaging statements, that the claim was an "exaggeration;" "it was false from bottom to top." Having been cross-examined respecting a conversation with Hamilton, Butcher says, "I said he would not be allowed to put it on me." Hamilton's evidence is also exceedingly damaging to the plaintiff, Longley, as he says that Butcher, the co-plaintiff, said to him that Longley was guilty and deserved the penitentiary, and that he washed his hands clean of it.

With this, we have the evidence of Sergt. Power, Alderman Power and Annie Shiels, all bearing strongly against Longley. The evidence of his complicity in the destruction of the property is strong; but, if that were the only defense, a question might arise as to the propriety of setting aside the verdict. But the whole evidence from first to last bristles with badges of fraud and, although the jury said in answer to the question put to them at the trial, that there was no fraudulent intention in making the claim, their own verdict is evidence to the contrary, the claim being more than two-fifths over the amount of that verdict. To enumerate all the proofs of fraud in this case, would necessitate the recapitulation of nearly all the evidence; the difficulty being to find any evidence whatever favorable to the plaintiffs' claim. At the trial Longley valued the goods destroyed at $600, fifty per cent. more than the verdict, and, in contradiction to the other witnesses, testified that the stock was wholly burnt.

I am decidedly of opinion that the verdict must be set aside, with costs.

McDONALD *v.* STIRSKEY.

A WATCH was left by one Von Schoern with the plaintiff for repairs, and when called for two days afterwards was not ready, whereupon plaintiff loaned to Von Schoern a watch to be kept till the repairs were completed. The watch so loaned becoming out of repair in Von Schoern's hands, was taken by him to defendant for repair, and defendant loaned Von Schoern another to use in the meantime, with which Von Schoern absconded. Plaintiff, learning that his watch was at defendant's shop, demanded it, and defendant refused it, setting up a lien for repairs.

Held, affirming the decision of the County Court, that the loan of plaintiff's watch to Von Schoern was a mere gratuitous bailment, existing during the mere pleasure of the lender, passing no special property to Von Schoern, and that defendant could not set up any lien for the repairs.

An order for appeal was signed by the Judge setting out a number of grounds, but the Judge in his certificate left it to this Court to say whether an appeal could be allowed in an action of tort where the judgment was under $40.

Held, that the appellant could not be confined to this single ground of appeal, the Judge having a discretion under the Act of 1878, c. 9, s. 14, to allow an appeal on any point of law or practice in any matter tried or argued before him, and having granted an order setting out the grounds on which appellant wished to rely.

THE facts in this case were that one Von Schoern took a watch to plaintiff to be repaired, and two days afterwards, his watch not being repaired, received from plaintiff a watch to keep until the repairs were effected. The last mentioned watch, having got out of repair in Von Schoern's hands, was taken by him to the defendant and left for repair, Von Schoern receiving a watch from Stirskey to be kept until the repairs were effected. Shortly after receiving the watch from Stirskey, Von Schoern left for parts unknown. Plaintiff, ascertaining that his watch was in the hands of the defendant, demanded it, when defendant offered to give up the plaintiff's watch on being paid for his repairs and getting back the watch he had loaned Von Schoern. An action of trover was then brought in the County Court at Halifax for the watch, and the following judgment pronounced by JOHNSTONE, J.:—

This was trover for conversion of a watch bailed to Von Schoern while his was left with the plaintiff, a watchmaker, and was undergoing repairs. The proposition of law applicable to this case, and on which I shall decide it, is, "that the general owner, in virtue of his general ownership and right of possession, may maintain a suit against a stranger for an injury or a conversion." *Story on Bailments*, 24; *Mills* v. *Maston*, 1 C. M. & R., 659.

Von Schoern left his watch with plaintiff for repairs, and when called for it was not done. Stempson, clerk of plaintiff, then

lent Von Schoern a silver hunting watch belonging to the shop till his own was repaired. Von Schoern absconded without calling for his watch. Subsequently plaintiff's watch was found in the shop of defendant, where Von Schoern had left it for repairs. Plaintiff demanded his watch, when defendant told him he could have it on paying for repairs, $1.28, and getting returned the watch he had lent Von Schoern. Subsequently, on further written demand on him, defendant unqualifiedly refused to deliver it up.

Von Schoern was a gratuitous bailee and had no right to part with the watch. It was left with him for a special purpose, and the defendant was in the eyes of the law a trespasser and subject to an action at the suit of the bailor or bailee. The plaintiff's witness valued the watch at $18. The defendant fixes the value of a new watch at $12; in its then state at $8. The defendant came into possession of the watch in the first instance innocently. I am therefore disposed to take something near a medium value, and give judgment for plaintiff for $12.

The Judge granted an order for an appeal, in which a number of grounds of appeal were set out, but in certifying the papers, left it to the Supreme Court to say whether an appeal lay in a case of tort where the judgment was under $40.

Boak, for plaintiff, took a preliminary objection that the statute required a succinct statement of the grounds of objection, and that the only question left to the Court by the Judge below was whether the appeal would lie.

Sedgewick, contra, pointed out that the grounds were all set out in the rule for appeal signed by the Judge, and, as to the question of jurisdiction to hear the appeal, contended that the matter was governed by the amount claimed in the writ, which in this case was $40, citing section 25 of the Act of 1877, as amended by section 13 of the Act of 1878, giving an appeal where the judgment or the amount in dispute was over $40, which he contended was equally applicable to the case where the amount in dispute was only $40. He cited *Joyce* v. *Hart*, Supreme Court of Canada Reps., 321, to show that the amount in dispute was ascertained by the conclusion of the declaration, and *L. R.*, *4 P. C.*, 313, to show that the

objection was taken too late. He further cited section 14, giving the Judge discretion to grant an appeal in all cases.

The preliminary objection was overruled under the section last cited, giving the Judge discretion to grant the appeal, and the argument proceeded with.

Sedgewick contended that plaintiffs were bound to prove that they had repaired Von Schoern's watch; that Von Schoern was bailee for consideration, was under obligation to return to plaintiff his watch in good condition, and had, therefore, a right to take it to defendant, who had properly received it, and lawfully refused to give it up until his lien was discharged; that, although defendant, in demanding that plaintiff should give him his (defendant's) watch, had made an illegal demand, that did not excuse plaintiff from complying with the part of the demand that was lawful. *2 Lord Raymond*, 1807; *3 Starkie*, 172; *Cross on Lien*, 28; *5 M. & W.*, 342; *4 M. & W.*, 273.

Boak and *Ritchie*, contra, contended that the loan of the watch by plaintiff to Von Schoern was a gratuitous bailment. There was no consideration for the loan. It was a mere custom, and no contract arose between the parties. Von Schoern had therefore no property in it, not even a special property, and could give no rights to the defendant. *4 Esp.*, 174; *Cross on Lien*, 27, 28; *5 Vesey*, 111; *6 East.*, 17; *5 T. R.*, 604; *9 Cowen*, 67; *9 East.*, 49; *2 Camp.*, 335. Even if defendant had a lien he waived it by making a demand inconsistent with the lien. *1 Camp.*, 410; *4 M. & G.*, 674; *28 L. J., Exch.*, 303; *9 M. & W.*, 675. The defendant could not have sued plaintiff for the repairs, and that is the test of the lien. *Redfield on Carriers*, 301; *5 H. & N.*, 390; *6 C. B., N. S.*, 365.

Harrington, in reply, contended that the bailment was not gratuitous; that it was made to prevent Von Schoern from handing the watch to another watchmaker for repairs; but that, even if it were gratuitous, the obligation rested upon Von Schoern to return it in good order, and therefore, if out of order, to have it repaired. *Webber* v. *Cogswell*, 2 Russell & Chesley, 47; *Story on Bailments*, sec. 377; *9 East.*, 433; *Cross on Liens*, 46.

SMITH, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

This case was brought before us on appeal from the judgment of the County Court Judge for district No. 1. It was trover for the conversion of a watch which came into the possession of defendant, a watchmaker, for the purpose of repair. The circumstances connected with the case are somewhat peculiar, and may result in a hardship on one or other of the contending parties. Much, however, as this is to be regretted, this Court has no alternative but to administer the law whatever consequences may flow from it.

It appears that one Von Schoern took to the plaintiff's shop a watch to be repaired, and called in two days for it, but found that the repairs had not been made, and the clerk of the plaintiff lent him a silver hunting watch until his was repaired; that, subsequently to this, Von Schoern left the watch so borrowed from McDonald with defendant, Stirskey, to be repaired, and obtained from him another watch on loan, and left the Province in possession of defendant's watch, and with his own watch in plaintiff's hands unrepaired. A demand of possession on two occasions was made on behalf of plaintiff for the watch left with the defendant, and he refused to give it up, using the language, as testified to by himself, that he would keep the watch until he got paid for repairs and got his watch back. Under this state of facts the learned Judge of the County Court gave judgment for the plaintiff.

It was urged at the argument that the plaintiff should be confined to the single point referred to by the Judge in his certificate, viz; whether appeals can be allowed in actions of tort where the judgment is under $40. I have had occasion in the case of *Anderson* v. *Taylor*, (*post*, 526,) to consider the 14th sec. of cap. 9 of the Acts of 1878, without which I should entertain grave doubts as to the right of appeal in such cases, but I regard that section as conferring a discretionary power upon the Judge to allow such appeals. This contention to limit the argument to the one point, I apprehend, is based upon the words of this clause which require the Judge to succinctly state the point of law for the opinion of the Court. If the learned Judge had confined himself to this point alone, I would be disposed to uphold the contention; but he has done more, he

has, in his order for the appeal, opened up all the legal questions which the case involves, and I therefore think they were legitimate subjects of argument, and must be by us decided.

The defense set up by the defendant is, first, that the watch came into Von Schoern's possession upon a contract which bound the plaintiff to repair his watch, and, until such repairs were made, a special property passed to Von Schoern which could not be terminated by a demand, although found in a third party's possession with a legitimate object; secondly, that, there being a duty imposed upon Von Schoern to return the article in as good condition as when received by him, the wear and tear excepted, the defendant had a lien upon the watch for repairs put upon it to enable Von Schoern to fulfil this obligation. After looking into the authorities on the subject, I cannot understand the manner in which this watch passed into Von Schoern's possession as constituting any such contract as contended for. It cannot be regarded, in my opinion, in any other light than as a gratuitous or pecarious loan existing during the mere will and pleasure of the lender. I can perceive no element upon which either an implied or a positive contract of the nature set up can be maintained. To contend seriously that the fact of my watch being in the hands of a watchmaker for repairs, and that because it is not repaired two days afterwards, he voluntarily lends me another to use until mine is done, creates a contract which disenables him from revoking the loan, is a strange and somewhat novel position to assume. No special property passed to Von Schoern. He had merely the possession or custody, sufficient no doubt to enable him to recover against a wrong-doer, but he had no possible title or interest in the watch as against the lender. *Story on Bailment*, sec. 47, 283. In sec. 279 *Story* says; "A mere gratuitous permission to a third person to use a chattel, does not, in the contemplation of the common law, take it out of the possession of the owner, so as to prevent him from maintaining an action for any injury to it or any conversion of it by a third person." Neither would a bailment by deposit create any special property or interest in the bailee. Such a bailment might be revoked at any time by the bailor. This being the character of the possession of the watch in question by Von Schoern, as I hold it to be, we have next to

enquire whether the defendant can legally set up a lien for the repairs done upon it at the instance of Von Schoern. There are not any cases which I have been able to find strictly analogous to the one before us, but there are one or two which in principle may guide us to a reasonable and legitimate conclusion. In *Hiscox* v. *Greenwood*, 4 Esp., 174, it was held that the defendant had no lien on the chaise left with him for repairs by plaintiff's servant without his authority or knowledge; and in *Hollingsworth* v. *Dow*, 19 Pick., 228, it was decided that where one who had a contract to furnish a machine engaged a mechanic, without the knowledge of the owner, to perform the work, disclosing to him the contract with the owner, such mechanic did not acquire a lien in his own right for the labour on the machine, although the owner knew he was performing the work while it was in progress. These decisions appear to me to be based on sound sense and reason. It would be manifestly unjust were the law to enable a bailee who had simply a gratuitous use of an article to injure or perhaps nearly destroy it, and then to bind the owner for the repairs to perhaps an amount nearly if not equal, to its actual value. If the contention of the defendant could be sustained, this would necessarily follow, and simply because he was bound to restore it in the condition in which it was received by the bailee. If such a doctrine could be held, I am inclined to think I should look upon the law appertaining to gratuitous bailments as in direct antagonism with justice and common sense.

There were cases referred to on the argument which would appear to support the lien set up by defendant, but they can have no application here, as they only refer to instances of inn-keepers and common carriers who are by law invested with peculiar privileges in view of the heavy responsibilities and duties which attach to them. But the later cases have decided that if the inn-keeper knows when the goods are brought that they do not belong to his guest he cannot detain them for his bill. *Broadwood et al.* v. *Granara*, 10 Ex., 417, 28 Eng. Law and Eq. R., 443.

It was thrown out at the argument that the plaintiff was seeking to obtain possession of the watch from the defendant and at the same time retain the watch of Von Schoern, and

thereby leave the defendant the loser of his watch. This may work a hardship to defendant, but it does not now, as it did not at the argument, affect in the slightest degree my mind with reference to the relative legal positions of the parties. The plaintiff is entitled to recover on legal principles in a court of law and his right must prevail quite irrespective of any sympathetic considerations. The plaintiff can only recover and retain one watch; he holds the other for Von Schoern, and is liable to be called upon at any moment for its restoration.

There were several cases cited on the question of defendant's having, if any lien existed, waived his right by refusing to deliver up the watch unless not only the price of the repairs should be paid, but that the watch loaned to him by Von Schoern should be restored to him. It will be unnecessary for me to express an opinion on this point, for two reasons, viz., first, because I hold no such lien to have been created; and secondly, because it does not appear from the papers furnished us that a waiver was pleaded.

I think the judgment of the learned Judge below must be affirmed.

ANDERSON *v.* TAYLOR.

This cause being at issue and for trial in the County Court at Antigonish it was agreed by the parties to refer it to arbitration, but no steps were taken to that end by either party, and on the cause being called on the docket on the first day of the sittings, defendant's counsel not answering, plaintiff obtained judgment under the practice in R. S., cap. 94, sec. 202, which did not come to the knowledge of the defendant until more than a year afterwards. Defendant then obtained a rule *nisi* from the County Court Judge to set the judgment aside on the ground among others that no proper notice of trial had been given, but the Judge discharged the rule *nisi*, on the ground that it had not been moved for within a year. An appeal was allowed on the grounds appearing in the rule *nisi*.

Held, that an appeal lay from the decision of the County Court Judge, under the Act of 1878, cap. 9, sec. 14; that the Judge of the County Court had an inherent right to open up the judgment, even after the lapse of a year to let in a trial on the merits; that the plaintiff's notice of trial was bad, there being no place named where the trial was to be held, and, therefore, that this Court must deal with the judgment as if there had been no notice of trial.

WEATHERBE, J., though concurring in the result, questioned whether the provisions as to appeal in the statute of 1878 were applicable to the case, as the action had been commenced previous to 1878, and held that the provisions in the Act of 1877 were not applicable, as there had been no trial, but that there was an appeal by sec. 53 of the Act of 1874, cap. 18, which he held to be unrepealed.

THIS was an an appeal from the decision of the learned Judge of the County Court for District No. 6,—CAMPBELL, J

The cause was for trial at Antigonish, and judgment was taken for the plaintiff, defendant not being present at the calling of the docket. The Judge below granted a rule *nisi* to set aside the judgment, on grounds appearing by affidavit, and which are explained in the arguments of counsel and the decision of the Court. The rule *nisi* was discharged by the County Court Judge and an appeal was taken from his decision, which was argued this term before DESBARRES, MCDONALD, SMITH and JAMES, J J.

Graham, for respondent, took a preliminary objection that there was no appeal in the cause, contending that there could be no appeal from the decision of the Judge of the County Court on a motion, and, further, that there could be no rule for a new trial in the County Court previous to 1878 (in which year such a power was conferred,) and that the Act of 1878 was not applicable to this cause, which had arisen previously. He further contended that a rule under the statute for a new trial could not be granted on the ground of surprise, citing *Marmoud* v. *McCready*, decided by this Court.

MCDONALD, J., pointed out that the Practice Act provided for setting aside judgments taken in this way, (that is on account of the absence of defendant at the calling of the docket,) and that the County Court adopted the provisions of the Practice Act.

The argument of the appeal was proceeded with.

Graham, continues.--The motion to set aside the judgment is based on affidavits, showing that an agreement was entered into to refer the cause to arbitration, and a rule, by by consent, taken therefor. After that, defendant did not proceed with the reference and, upon the cause being called, plaintiff took judgment "in the ordinary way."

Hunt.—The Judge of the County Court has no power to call the docket and give judgment. That is only by the procedure of the Supreme Court.

Sec. 202 of the *Practice Act*, c. 94, provides that the Court may place a cause on the docket when it has been struck off for not answering.

Graham.—That point is not taken. I don't intend that you shall have leave to take it now.

Hunt.—This judgment was obtained simply on the ground of absence of counsel, who relied on the assurance of plaintiff's attorney that the cause would not be tried. No notice was given of the fact to defendant till after one year and three months expired, and then, when the motion was made, the objection was taken that more than a year had expired. The plaintiff was the moving party to refer. My delay of two months is accounted for.

Graham.—The Court has decided that there is no appeal from the Magistrates' Court to this. If there is an appeal here there is an appeal from every interlocutory motion. There is no appeal from a decision of a County Court upon a motion. Sec. 25 of cap. 6, Acts of 1877, enumerates the decisions from which appeals are allowed. It does not include such a motion as this. It refers to a motion before the Judge who "tried" the cause. Here there was no trial. The word "try" has a distinct legal significance. No appeal lies from the County Court to this Court save after a trial. In controverted election matters the decisions have proceeded on that ground. In the *Langevin* case the Supreme Court decided that there was no appeal in the cause, where the statute gave an appeal from the decision of the Judge who *tried* the cause, on the ground that there was no *trial*. The only grounds taken in the rule for appeal are that no proper notice of trial was given and that the judgment was obtained against good faith. There is nothing in the first point. The notice is in the usual form. Cites *Sharp* v. *King*, Oldright, 540, to show that the party must swear he has been misled. Mr. Hunt was not misled here. He was relying on the agreement to refer.

WEATHERBE, J.—The rule also is on the grounds set out in the affidavits.

Graham, cites *Day's C. L. P.*, 285. The rule there requires the grounds to be shortly set out. That is less exacting than our rule, yet it was held not sufficient to state "on the grounds set forth in said affidavits," &c., *10 Exch.*, 472.

The alleged agreement to refer was very indefinite, and, nothing having been done by the defendant, it may have been considered "off."

The motion provided for in section 203, upon which defendants now rely, is altogether different from the motion they made below. Before the County Court Judge, they applied as if there had been a mistrial and asked for a new trial. That is not the motion contemplated by section 203.

WEATHERBE, J., puts the case of a clear mistake. Is there no remedy after the lapse of a year?

Graham.—I think not.

The ground that the County Court Judge had no right to call the docket is not taken in the rule, and I am not going to argue it.

The proceedings to open the judgment under section 208 must be taken within a year, as under section 75. *2 Chitty*, 987, gives the various cases as to delay.

Rigby, Q. C.—As to the appeal, it is not confided to the Court to decide that. It has already decided in the case of *McCabe* v. *McKay* that in a case like this there was an appeal. There an appeal was allowed from a motion in the County Court. The question was raised whether it was appealable or not.

Suppose there was no notice of trial at all, and a judgment taken, after more than a year from which a motion is made to set aside the judgment and refused. The contention opposite is that there can be no appeal from such a decision.

The words *trial*, &c., do not refer to the subject matter of the appeal. They only distinguish the person to whom the application is to be made. Here, without straining, it may be contended that there was a trial; there was an issue, &c. The case in the Supreme Court,—the *Langevin* case,—was where there had been no appearance, but only a decision on a preliminary objection.

The statute expressly provides for an appeal from a motion for a "new trial," which this is, in effect. The affidavit states that there was a trial, and that is not contradicted. McGillivray swears that he got the judgment in the usual way, which is after the examination of witnesses.

The other side are relying on technicalities and must show that they come within the terms of the law on which they rely.

As to the sufficiency of the grounds, the object is to give notice to the other party what he has to answer, and when the Court sees that the party has information, it will not require such specific statement as otherwise. *Day's C. P. A.*, 285; *Moody* v. *Northern Ins. Co.*, Thompson, 173. The Judge decided it on the single ground that more than a year had elapsed. We have a right to discuss the propriety of so deciding, under the grounds there stated, viz., "the grounds set out in the affidavits." Cap. 6, of Acts of 1877, sec. 17, makes practice of the County Court conform to that of the Supreme Court. All the practice of the Supreme Court applies to the County Court. See also sec. 13 of 1874, cap. 18; *Chitty's Arch., Q. B. Pr.*, 986.

Sec. 6 of cap. 18 of 1874, provides expressly that the notice of trial must specify the time and place. Where the statute is thus positive, the question as to whether the party was misled does not arise. The case in *Oldright*, cited, was on English Common Law. *2 Dowl., P. C.*, 350.

Having agreed to refer the cause, the plaintiff was under a legal obligation to give new notice of trial before proceeding to trial, and he was the the moving party. He got the judgment and let it lie for a year, and, immediately after, he issued an execution. That is evidence of bad faith.

Graham, as to notice of trial, cites *Chitty's Arch.*, 315; *2 Strange*, 1237.

SMITH, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

This is an appeal from the decision of Judge CAMPBELL, of the County Court, District No. 6. It appears from the affidavits used at the argument and the exhibits annexed thereto, that in the month of December, 1876, one Daniel Anderson, of Harbor au Bouche, by his attorney, Angus McGillivray, sued out of the County Court of Antigonish, a writ of summons against Robert Taylor, of the city of Halifax, to recover the sum of $141.49; that the defendant, by his attorney, J. Johnston Hunt, pleaded to said suit a denial of any indebtedness as alleged, payment, and a set off, by which latter plea he claimed a balance of $132.32 as being due to him. After the cause was thus at issue, the affidavit of

Mr. Hunt sets out that, in or about the month of March following, and before the then next sittings of the County Court at Antigonish, he met Mr. McGillivray, who, after the desire of the defendant was conveyed to him that the cause should be left to arbitration, replied that he had no objection and would agree to refer the same; that after this conversation he, Mr. Hunt, saw Mr. Henry, a practising barrister of this Court, residing at Antigonish, who, it appears, he had previously spoken to to attend to the said cause for him, and communicated the fact of the intended reference, and that, consequently, his services would not be required.

Mr. McGillivray, in his affidavit, does not deny that he expressed his readiness to leave the cause to arbitration, as stated by Mr. Hunt, but says; "I requested him to apply to said Court for a rule of reference in the matter, or words to that effect." It appears that no further action was taken in the cause by Mr. Hunt, and he states that he "heard nothing more of said cause or from plaintiff's attorney until the month of July last past," (*i. e.*, July of the year 1878,) a period of fourteen months," when the defendant brought him a letter from plaintiff's attorney, which informed him of the fact that a judgment had been entered up against him for the sum of $192.90, and demanding payment. He then wrote Mr. McGillivray, "reminding him of the reference," and asking him to "cancel the judgment and go on as per agreement." To this Mr. McGillivray replied; "I expected you would appoint an attorney to attend to the matter for that purpose. J. J. McKinnon, Esq., stated in the Court that he was spoken to on the subject by you, and that he was to receive the papers in the cause, but as he did not receive them he could not attend to the matter. My client pressed for judgment and we took judgment in the ordinary way."

It is evident from McGillivray's affidavit that this judgment was obtained, in pursuance of the practice in this Court, as regulated by Sec. 202 of our Practice Act, and which, it is contended, governs in the County Courts, under the Act of 1874, which assimilates the practice of those Courts to that of the Supreme Court. On the 18th October, 1878, a rule *nisi* was granted by Judge Campbell, returnable before him at Chambers at Guysborough, on the 22nd day of said month, to

set aside said judgment on the grounds that "no proper notice of trial had been given, and that the said judgment had been obtained by plaintiff's attorney against good faith, and after plaintiff's attorney had agreed with defendant's attorney to leave the said cause to arbitration, and on other grounds appearing in the affidavits."

On the 22nd day of October, 1878, this rule was discharged on the ground "that one year had elapsed since judgment." An appeal was granted by the Judge on the 28th of said month, on the same grounds set out in the rule *nisi*, and we are now to consider;

1st. Whether an appeal lies from a decision such as this to this Court.

2nd. Whether, upon the facts disclosed, the Judge could and should have set aside the judgment, and,

3rd. The sufficiency of the notice of trial.

The 14th section of cap. 9 of the Acts of 1878 seems to put any doubt upon the first point entirely at rest, and give the County Court Judge a discretionary power to grant an appeal upon any point of law or practice in any matter tried or argued before him, which discretion he has exercised here. It is true this section requires that he should succinctly state the point of law which is submitted for the opinion of the Court of Appeal, which, I think, he has sufficiently done in his order, and that, consequently, the appellant is confined to the grounds specifically mentioned, viz., the alleged defect in the notice of trial, and that the judgment was against good faith and in violation of the agreement to refer.

In considering the latter point, I may at once express my opinion that there is no evidence to establish the position that Mr. McGillivray acted contrary to good faith; but I cannot well comprehend how Mr. Hunt on the one hand permitted the cause to repose so long, and Mr. McGillivray on the other hand allowed the judgment to sleep for over a year without issuing execution or communicating its existence either to the defendant or his attorney. It is clear to my mind that the judgment was obtained under some misapprehension on the part of Mr. McGillivray, arising, not only from what passed between him and Mr. Hunt, but from what fell from Mr.

McKinnon when the cause was called; and, if possible, we ought, in view of the very strong affidavit of merits sworn to by defendant, corroborated by his act in first authorizing a suit to be brought for the amount of his set off, to afford an opportunity for a trial, whereat justice might be done between the parties. If the application to remove the jugdment was was made under section 75 of the Practice Act, which can scarcely be contended for, the learned Judge was undoubtedly right in deciding that the application was made too late to come within its operation, one year having elapsed since final judgment. The difficulty of relying upon section 202 of the same act was presented to us upon the argument, and it is not without weight, that the words are that "new as well as continued *jury* causes for trial shall be called on the first day," whereas there are only juries in the County Court in special cases, and under certain circumstances, and that consequently this clause is inapplicable. Without deciding this objection or enquiring into the manner of obtaining the judgment, the fact remains that it was obtained, and we have to ascertain whether a judgment had under the circumstances detailed in the affidavits, could be opened up by the County Court Judge. I entertain no doubt whatever that an inherent right exists in an inferior Court as well as in this Court, without any legislative power given, to set aside either an interlocutory or a final judgment, on sufficient grounds, to let in a trial on the merits. In *3 Comyn's Digest*, 357, it is laid down that "the Judge of an inferior Court may set aside a regular interlocutory judgment in order to let in the trial of the merits." The same authority says; "He may set aside a verdict when, after notice of trial, a reference is agreed to, and plaintiff without new notice goes to trial."

Regarding the laches urged against Mr. Hunt in allowing so long a period to elapse before moving to set aside the judgment to have been satisfactorily explained by his affidavit, I think we will be obliged to turn our attention to the very serious difficulty standing in the way of the retention of the judgment arising out of the defective nature of the notice of trial. Section 6 of the Act of 1874 requires that the notice *shall* state the *time* and *place* when and at which the trial is to take place. It is quite true that there are English cases, as well

as decisions of this Court, which go to remedy irregularities in notices of trials where the defendant has not been deceived thereby. The case of *Henbury* v. *Rose*, 2 Str., 1237, and that of *Keane et al.* v. *Sharp*, 1 Oldright, 540, are to this effect. But these differ essentially from the case of a notice having certain statutable requisites, inasmuch as these cases are governed only by the application of principles of practice moulded to a large extent by the Court itself. I think the notice should strictly follow the statute, and, as the one before us does not do so, there being no place named where the trial was to be held, we must deal with the judgment as if no notice had been given.

I think the decision of the learned Judge must be reversed, and that the judgment must be set aside, costs to abide the event.

WEATHERBE, J., delivered the following opinion :—

An application had been made in the County Court to set aside a judgment obtained without trial after plea pleaded, on the first day of the sittings, the defendant being unrepresented, because, as he says, there was an agreement to refer the cause to arbitration. Defendant was not aware of this judgment, and he did not discover it for more than a year. The application was refused on the ground that judgment had been entered for more than a year, and from this decision defendant appeals.

It was contended on the part of defendant that the provisions of the statute of 1874, cap. 18, by which this Court formerly had jurisdiction of appeal from the County Court, were no longer in force, that our authority to review a decision of that Court must be found in the Act of 1877, and that this Act contained no provision for appeal in this cause, because there had been no trial.

Sec. 25 of the Act of 1877 provides that in causes over forty dollars either party dissatisfied with the decision of a judge on a point of law, or his charge to the jury, or decision on motion for non-suit, new trial, in arrest of judgment, or for judgment *non obstante veredicto*, or for admission or rejection of evidence, may apply to the judge *who tried the cause*, for an appeal. By sec. 26, on refusal, he may, on, or before

the last day of the sittings at which the cause has been tried, or such further time as the Judge may allow, file security, in which case *no judgment shall be entered up*. Sec. 27 provides for entering the cause for argument in this Court, and enacts that this Court may order a new trial or how, otherwise, it may direct the Court below. Sec. 28 relates to quashing the appeal; sec. 29 regulates the certifying of the proceedings below, and sec. 30 requires the appellant to see to the filing of the papers in the Supreme Court in the "*county where the cause was tried.*"

This, I think, embraces the legislation of 1877 respecting appeals.

There was in this case no trial in the Court below. Is there an appeal? Mr. Rigby, for the appellant, contended that the words "*judge who tried the cause*" should be read "judge who would have tried the cause." The phrases "trial at Bar" and "trial at *Nisi Prius*" have each a well-defined legal significance. *Triare*, according to *Bracton*, as cited in *Burrell's Law Dictionary*, was used in the old English law in the general sense of *determine* and was made synonymous with *terminare*, which meant to end or determine, or to dispose of judicially, and it was used in a similar sense in the civil law. *Mr. Stephen* in his *Treatise on Pleading*, (see 9th Am. Ed., p. 76), says; "the decision of the issue in fact is called the *trial*," and in a note (29) to the appendix it is said, "*trial* has long been used to express the investigation and decision of *fact* only, but would appear to have originally signified *decision* in general; for which he cites *Bracton*, and he adds that *Britton* applies the French word *trier* in the same way. The origin of the word *trial*, he says, like almost every term of English law, is of French extraction, being derived from *trier*. In *Co. Litt. 124 b.*, the word is defined to be the finding out by due examination the truth of the point in issue between the parties whereupon judgment may be given. *Blackstone* says; "Trial, then, is the examination of the matter of fact in issue. In *4 Mason*, 232, where some English and American decisions are discussed, the question arose on a conviction for murder. The statute required a copy of the indictment to be delivered to the prisoner two days *before the trial*. It was held that this meant before the *trial by the jury*,

and not before the prisoner's arraignment and pleading. "The question is," says STORY, J., who delivered the opinion of the Court, "what is meant in this statute by the words, '*before he shall be tried*,' and, '*before the trial*,' for they are doubtless equivalent. Do they mean that the copy shall be delivered two days before the jury is sworn to try the cause upon the issue of fact, or do they mean, before the party is arraigned on the indictment and put to plead, and before it is ascertained whether by his plea there will be a trial by jury or not? . . . In short, so far as authorities or reasoning or forms go, there can be no legal doubt that by the term '*trial*' is generally intended in the law the actual trial of the prisoner by the jury."

The words, "last day of the sittings at which the cause has been tried," and the provision for giving security to prevent a judgment from being entered up are conclusive, it appears to me, in excluding the appeal in this case from an order refusing to set aside a judgment long previously entered, "by default," or without a trial before the Judge of the County Court, from the class of cases provided for in the Act of 1877.

I should, perhaps, mention a cause of difficulty in my mind —though no reference was made to the subject at the argument—in deciding whether the Act of 1877 could give this Court any jurisdiction in cases commenced before the passage of the Act. I refer to the well known maxim, *nova constitutio futuris, etc.* It has again and again been decided that where a change has been made in the law by statute, pending an action, the law in force at the commencement of the suit must decide the rights of parties, unless the intention of the Legislature to vary the relation of parties is clearly expressed. See *12 M. & W.*, 305, 306; *3 A. & E.*, 895, and *1 Rep. Sup. Court of Canada*, 80, and the cases there cited.

This action was commenced previously, though the application the refusal of which is the subject of this appeal was subsequent to the passage of the act. The question is whether this is procedure or matter of right. The question of the right to have execution on a judgment is discussed by the Supreme Court of Canada in the case of the *Queen* v. *Taylor*. The same difficulty, of course, which arises respecting the Act of

1877 exists as to the Act of 1878, which causes me the more regret because I cannot satisfactorily follow the process of reasoning by which a majority of the Court has been enabled to sustain the appeal. Without determining the question of the retrospective operation of the clauses of the Act of 1877 relating to appeals, one question remains as to the Act of 1874. Are the clauses relating to appeals no longer in force? By section 51, the decision of the presiding Judge shall be subject to an appeal to the Supreme Court in all causes between forty and eighty dollars, upon the appellant giving security as directed in the 53rd section. By section 53, in case any party in a cause in any of the County Courts is dissatisfied with the decision of the Judge *upon any point of law or fact*, or with the finding of the jury on any fact left to them, or with the decision upon motion for a non-suit or in arrest of judgment, he may appeal to the Supreme Court, and may also have a stay of proceedings, providing security be given as therein required, and the Judge shall certify to the Supreme Court the pleadings in the cause and all motions, rules or orders therein, with his charge, judgment or decision, "*and, when a trial has been had,*" the evidence and all questions and exceptions thereto.

If in force, there cannot be a doubt that an appeal would lie under section 53. Section 51 permitted an appeal from every decision whatever of a Judge in causes between forty and eighty dollars, on filing security, without a stay of proceedings. Section 53 directs appeals with a stay of proceedings, on giving security from decisions upon (*inter alia*) all points of law or fact. Is this last section in force? In the case of *McCabe* v. *McKay, (ante,* 83,) cited by Mr. Rigby, the point taken here respecting the effect of the words confining appeals under the Act of 1877 to *causes which had been tried* was, as counsel admitted, not there considered, and it appeared by the newspaper report of the decision handed to us after the argument, that the appellee was not represented on the argument. The contention for plaintiff here was that sections 51 and 53 of the Act of 1874 were repealed. If so, they are repealed by section 34 of the Act of 1877, which merely repeals all acts or parts of acts *inconsistent* with the latter act.

By the Act of 1877, sections 7, 10, 20, 23, 25, 31 and 52 of the Act of 1874 are expressly amended by adding or substituting words, and sections 15 and 37 of the latter act are, by express words, repealed and other clauses substituted. If it had been the intention of the Legislature to supersede altogether the sections of the Act of 1874 relating to appeals, why were they not dealt with as sections 15 and 37? The statute of 1874 gave an appeal on a point of law in a case where there had been no trial. The statute of 1877 legislates respecting appeal in cases only where there have been trials. Is there anything in the provisions of the Act of 1874, allowing an appeal in a case where there has been a default without trial, inconsistent with the law of 1877 providing for cases only where there have been trials? Clearly there is nothing inconsistent, and, therefore, I think, under the Act of 1874, this Court has jurisdiction of appeal in this case.

The statute gave the Judge of the County Court ample power to deal with the judgment entered up against defendant, and I agree with the opinion already delivered, that there was an error in supposing that the statute limiting the Court to the period of one year applied to this case. The judgment should have been removed, and, I think, the appeal should be sustained, with costs.

IN RE ESTATE OF GRANT, INSOLVENT.

THE assignee in his final account charged commission on $7,400, the gross proceeds of real estate sold under foreclosure, the whole of which, with the exception of $14 surplus, was paid over by the sheriff to the attorney of the mortgagee. The order for the assignee's discharge passed December 20th, 1877, and on Jan'y 3rd, 1878, the County Court Judge granted an order *nisi* to re-open the order for discharge in order that this sum of $7,400 should be deducted from the amount on which assignee's commission was charged. The Judge, after argument, discharged the order *nisi* on the ground that, the eight days for appeal from the order discharging the assignee having expired, the assignee was beyond the summary jurisdiction of the Court.

Held, that, apart from any legislative act conferring it, the Judge had power to re-open the order for the discharge of the assignee for the purpose of reducing his charge; that, in addition, the Judge had the power under section 28, sub-sec. b of the Insolvent Act of 1875: that the assignee was not entitled to commission on the $7,400, and that the judgment on the order *nisi* must be reversed.

THIS was an appeal from the decision of JOHNSTONE, J., of the County Court for Halifax County. The assignee charged the estate with a commission on $7,400, being the

gross proceeds of real estate sold under foreclosure, which did not realize more than $14 over the amount of the mortgage. The learned Judge of the County Court granted an order *nisi* to re-open the discharge of the assignee and the account, but afterwards discharged it on the ground that the assignee had passed beyond his summary jurisdiction. An appeal was taken from this decision and argued this term before DES-BARRES, MCDONALD, SMITH and WEATHERBE, J J.

Foster, Q. C., takes a preliminary objection to the appeal, that it was not taken out within the time limited by the statute. Instead of the application to re-open the discharge, the appellant here should have appealed within the statutable time from the order confirming the discharge.

The COURT.—This is not a preliminary objection.

Rigby, Q. C., for appellant.—The assignee here charged a commission in his final account on the sum of $7,400, being the amount realized by the sale of certain real estate of the insolvent, sold under an order of foreclosure and sale from the Equity Court, and being only about $14 in excess of the amount due on the mortgage foreclosed and costs. The clause under which he claims his remuneration, section 43 of the the Insolvent Act of 1875, only gives him a commission on "the net proceeds" of the estate.

Section 47, respecting the assignee's discharge, provides that the Judge shall direct the assignee's accounts to be audited by the inspectors or such creditors as he shall appoint; here the assignee simply presented his accounts signed by the inspectors. Every Court has unlimited power to re-open its own proceedings; *7 M. & W.*, 502. The Judge, therefore, had a right to give us the rule *nisi* to re-open the discharge of the assignee, and his judgment on the argument of that rule *nisi* is appealable under the statute. (MCDONALD, J.—You are here appealing from a judgment refusing to set aside an order from which you failed to appeal.) The application to the Insolvent Court itself to re-open its own proceedings seemed the speediest and simplest remedy, and the authority of the Court to re-open those proceedings is established by the case reported in *7 M. & W.*, 502.

The assignee here knew that the charge of a commission on the $7,400 was objected to by creditors when he applied

for his discharge, and he should have raised the point himself, as he had not given notice of his application to the objecting creditors. Cites *L. R., 5 Q. B.*, 208.

Foster, Q. C., contra.—All that the Court can know in this case must be found in the papers before it. They show that this property came into the hands and under the control of the assignee, and he must be held to have been requested to sell this property. I contend that this Court cannot now go into the merits. The Judge below had no discretion in the matter after the eight days allowed for appeal had expired. He could not re-open the matter or rescind his own order, even assuming that he had the right to do so before the expiration of the eight days. If there is any discretion in the matter he was the one to exercise it, and he has said that in his opinion it had passed beyond his jurisdiction. *Clarke on Insolvency*, 305, citing *4 U. C., Pr. R.*, 16. The Court below is to judge whether any gross mistake has been made; and the learned Judge of that Court has decided that no mistake was made. There is no appeal from that. The appellants do not state that they were not aware before the expiration of the eight days of the facts upon which they base their application. They had it in their power to ascertain the fact as to these charges when the dividend sheet was made up and it was their duty to inquire then. Cites sections 43 and 118 of the Insolvent Act of 1875.

DESBARRES, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

In this case an order *nisi* was granted by the Judge of the County Court for District No. 1 on the 3rd January, 1878, on the petition of the Bank of British North America, as creditors of said estate, for setting aside or re-opening an order made by that learned Judge on the 20th December, 1877, for the discharge of the assignee thereof, with the view of obtaining a reduction of the sum of $7,400 from the amount on which the said assignee was allowed a commission on his final account, and that the said assignee might be desired to account to the creditors of the said estate for commissions improperly charged by him in his said account. On the day appointed for shewing cause, the learned Judge, after argument, discharged the said order *nisi* with costs, considering that, as the account was

passed, the assignee was exonerated from all responsibility to the creditors of said estate, and had, as he expressed it, passed beyond the summary jurisdiction of the Court. From this judgment or decision of the learned Judge, the Bank of British North America, through their agent, appealed to this Court, and, the case having been argued before us upon the various grounds taken by the appellant, it now devolves upon us to decide whether the judgment of the learned Judge ought to be sustained or reversed. It was contended by Mr. Foster, the counsel of the assignee, that, if the Bank of British North America was, as a creditor, dissatisfied with the order of the 20th December, made by the learned Judge, it ought to have appealed from it, and that, as the time for appealing therefrom had expired, the Judge had no power, even assuming the order to have been irregularly and improvidently made, to re-open it and grant the relief sought for under the second order, now forming the subject matter of appeal; and, secondly, that if the Judge had the power to re-open his first order, he had exercised a proper discretion in refusing to do so, from which there was no good ground for appealing. There was no doubt on my own mind, or in the mind of any of my brethren who were present at the argument, that the commissions charged by the assignee on $7,400, the amount realized on a sale made by the Sheriff under an order of foreclosure of mortgage on the insolvent's property, was a charge that ought not to have been allowed in his final account against the insolvent's estate, it being evident, from the receipts exhibited, that no part of that sum ever passed through the hands of the assignee, the whole amount having been received by the Sheriff as the proceeds of the sale, and paid over by him to the attorney of the mortgagee. But we reserved our judgment in order to ascertain whether, in a case like this, the law was so defective as to withhold from the Court below the power of correcting what clearly appeared to be an overcharge, possibly made under a misapprehension of the law; but still an overcharge that we thought, and still think, required correction. That the learned Judge below had the power of re-opening his order for the discharge of the assignee, for the purpose of reducing the excessive charge of commissions made by him as an officer of the Court, apart from any legislative act conferring it, I entertain no doubt. If the Court had no power to afford a remedy

in a case like this it would be powerless indeed; but that Court, like all other Courts, has, and necessarily must have, a controlling power over its own officers, ample enough to rectify any mistake or restrain any improper act committed while discharging their duties. In *Cocker* v. *Tempest*, 7 M. & W., 502, ALDERSON, B., says; "The power of each Court over its own process is unlimited,—it is a power incident to all Courts, inferior as well as superior; if it were not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice." It is unnecessary, however, to cite cases to establish a principle essential to the very existence and usefulness of every court, of less power than the County Court possesses, for the Legislature has spoken on the subject in language not to be mistaken. By section 28, sub-section *b*, of the Act of 1875, which was not referred to or noticed at the argument, it is enacted that "the official assignee shall be an officer of the Court having jurisdiction in the county or district for which he is appointed; he shall be subject to its summary jurisdiction, and to the summary jurisdiction of a Judge thereof, and be accountable for the monies, property and estates coming into his possession as such assignee, in the same manner as sheriffs and other officers of the Court are." Can there be any doubt, on reading this section, as to the power of the Judge below to make an order for the re-opening of the order granting a discharge to the assignee, and for reducing, if he thought fit, the charge made by the latter for commissions in his final account against the insolvent's estate? There can be none. The Judge was right in granting the order *nisi* for setting aside his first order, but I think he was wrong in discharging it under the circumstances of this case, which it appears to me not only call for an investigation, but for a correction of the charge. We are all of opinion that the assignee is not entitled to a commission on the sum of $7,400, the proceeds of sale of the insolvent's property under an order of foreclosure, as that sum never passed into his hands. And we reverse the judgment of the Court below on the order *nisi* of 3rd January, with costs, that the Court may re-open the order of 20th December, and cause the commissions charged on that sum to be deducted from the final account of the assignee and placed to the credit of the estate.

LOCKHART *v.* WATSON ET AL.

Under the County Court Act of 1877, cap. 6, sec. 25, there is no appeal from the decisions of the County Court Judge on questions of fact.

Plaintiff sued defendants for work done for the British Gold Mining Co., and, together with other evidence, produced a witness who said he had been one of a deputation that had waited upon the manager of the company to ascertain of whom it was composed, and that said manager had produced a document and read it, stating that T. W. and J. W., the parties sued, (with others whom he named,) were the parties concerned in the company; that the document was then handed to witness who read part of it to the company present who were quite satisfied that there was such a company. This statement was held to be admissible as secondary evidence of the document.

THIS was an appeal from the County Court, District No. 1. Several of the papers in the cause were certified by the Judge of the County Court and filed on the Tuesday before the Term opened. The rule for appeal was not filed till the 5th of December, three days after it should have been filed, and certain exhibits were not certified till the 13th.

McCoy, Q. C., urged these facts as a preliminary objection to the appeal.

Wallace, contra.—It is too late to take these objections; the proper time to take the objection is on the first day of Court. In the Supreme Court of Canada it has been so held in *Souther* v. *Wallace*, and in *Kearney* v. *Kean*. If the Judge does not file the papers, I cannot compel him to do it, except, possibly, by mandamus.

THE COURT.—The absence of papers, where there is no default of the appellant, is merely a reason for the postponement of the argument. Are you ready for the argument of the main question?

McCoy, Q. C.—No; but I would like to have the practice settled.

The first ground taken in the rule is that the judgment is against law and evidence; that is not stating a specific ground, in compliance with the statute, Acts of 1877, ch. 6, sec. 25. He should state the particular ground of law to which he takes exception.

It appeared from the papers that the action was for wages under the common counts, brought against Thomas and John Watson, doing business under the name of the British Gold

Mining Company; suggestion that Thomas Watson had left the province. One of the plaintiff's witnesses, called to prove the partnership stated that he had, with others, waited upon Thomas Watson, to examine the documents relating to the company, when said Thomas Watson produced a paper and read it, stating that Thomas Watson the elder, and he, Thomas Watson the younger, E. H. Hartman and John Watson were parties concerned in the company; Watson said the document had then been handed to him and he had read a part of it to the company present, who were quite satisfied that there was such a company. The document itself was not produced.

The judgment below was for plaintiff for the greater part of his claim. The defendant appealed from this judgment, and the appeal was argued December 16th and 17th, 1878, before YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J.

Wallace, in support of appeal.—Nearly all the plaintiff's evidence here was objected to and was improperly received. There is no evidence here of liability on the part of defendants. The agreement alleged to have been made by plaintiff with Thomas Watson was not such as Thomas Watson was authorized to make. Sharing in the ownership of a mine does not constitute the owners partners, where the mine is not worked. The engagement of the plaintiff by Thomas Watson did not bind John. Plaintiff only states that John Watson went into the the office once, when he happened to be here on a visit from England, and said to plaintiff; "go on with the Company's accounts." As to the right to appeal, see the *County Court Act*, ch. 18 of 1874, sec. 53. As to the secondary evidence, it was an attempt to constitute the defendants partners under a written agreement, of which the witness could not recollect positively one single word. It is difficult enough frequently for the Court to decide whether a document constitutes a partnership when the actual document is before them. The evidence was, besides, improperly received. There was no proof of sufficient notice to produce. *1 Taylor on Evid.*, 440. The witness only swears *he believes* the signature of John Watson to be his hand-writing. He must say that *it is* his hand-writing. Plaintiff did not engage himself on

the faith of the document in question, because he did not see it or know of it when he made the engagement.

Longley, contra.—The question here is simply one of evidence, the credibility of witnesses, on which the Judge below has passed, and from which there is no appeal.

As to the sufficiency of the notice to produce, cites *1 Taylor*, (ed. 1878,) p. 397, s. 480; *2 Sim. & St.*, 607. John Watson himself attempts to give evidence of the contents or character of the document in question. The suppression of the document raises an inference against the party suppressing it; *Taylor*, s. 804. There was evidence on which the Judge below was justified in finding that there was a partnership.

Wallace, in reply.—There is no proof of an agreement between the parties owning this mine that they would share profits and losses. One partner cannot against the other establish the partnership; there must be direct evidence. The holding of one's self out as a partner after the liability is incurred does not make him liable. John Watson did not do any act as holding himself out to be a partner till long after Lockhart was engaged as book-keeper. The test is whether credit has been thereby obtained, unless you prove that the person is an actual partner. *1 Lindley on Partnership*, 49–50; 42–44; 19–26; 28–35.

Plaintiff has proved that there was no partnership, because he states that *Hartman* was to supply all the capital. There must always be a participation in profits to constitute a partnership, but that alone is not sufficient. The agreement made by Thomas Watson was not on behalf of the four or five persons alleged by the plaintiff to constitute the partnership, but of himself and his brother John, who had not authorized the contract. The plaintiff himself swears that Thomas and John Watson alone were responsible. But he afterwards swears that he only saw John on the one occasion already referred to.

Plaintiff was employed in November, and went to jail in January, nearly three months afterwards, and in his schedule of assets omitted any statement of a debt due him from the defendants. Again, from April till July, when plaintiff alleges he was dismissed, he does not swear he was

in the office. (McDONALD, J.—Can we go into that?) Yes; my contention is that of the judgment here for $140, there is only evidence to support some $12 or $15, and *no evidence* for the balance.

DESBARRES, J., now, (January 23rd, 1879,) delivered the judgment of the Court:—

This action was brought by the plaintiff in the County Court for District No. 1, against John Watson and Thomas Watson, Jr., for the recovery of wages claimed to be due him for services rendered to and for the British Gold Mining Company, of which the said John Watson and Thomas Watson, Jr. were partners, and doing business at Waverley, together Thomas Watson and E. H. Hartman, the two latter of whom, being resident in England, were not sued. Thomas Watson, who acted as the agent and manager of the Company, having left, and being without the Province, John Watson was alone served with a copy of the writ and pleaded thereto, 1st, that he was not indebted with the said Thomas Watson, as alleged; 2nd, that he and Thomas Watson never did business together, as and under the firm of the British Gold Mining Company, and, 3rd, that plaintiff's claim against defendant was satisfied before action brought.

A suggestion of the absence of and non-service of process upon Thomas Watson, being made on the record in the usual form, the plaintiff proceeded to the trial of the cause, and the Judge of said Court, on the hearing and considering of the evidence produced on the trial, gave judgment in favor of the plaintiff for $140. From this judgment the defendant John Watson appealed to this Court, on the ground of its being against law and evidence, and for the improper reception of evidence to sustain the plaintiff's case.

The issues raised on the defendant's first and second pleas made it imperative on the plaintiff to establish the existence of a firm doing business at Waverley, under the name and style of the British Gold Mining Company, and to show that the defendant and Thomas Watson, Jr., were partners therein, in order to make the defendant responsible for the wages claimed by the plaintiff for the services rendered to that company as their book-keeper. That there was such a Gold

Mining Company doing business at Waverley, and that Thomas Watson, Jr., was the manager of it at the time the plaintiff was employed there, are facts which appear to be too well established to be disputed; but whether the defendant was a partner in that company with Thomas Watson, by whom the plaintiff was hired as book-keeper, is a question demanding careful consideration and to be decided by the preponderance of the evidence bearing on that point.

The learned Judge of the Court below, weighing the evidence on both sides, came to the conclusion that the defendant was a partner of Thomas Watson's in the gold mining business carried on at Waverley through his agency, and that defendant was, therefore, responsible with him for the plaintiff's wages; and it devolves upon us to decide whether his decision can be upheld.

I have read the evidence given at the trial, with the view of forming my own opinion of its sufficiency or insufficiency to establish such a partnership, and I entertain no doubt that the defendant and Thomas Watson the younger were partners together with Thomas Watson the elder and E. H. Hartman, in the Gold Mining Company doing business at Waverley, and that defendant, though not an active partner, interfering but little in the management of the business, is, and ought to be held responsible in law for the wages due to the plaintiff under a contract made between him and Thomas Watson, Jr., in which it was stipulated that he, Thomas, and John Watson, being the only partners of the firm residing in this Province, were to be alone responsible for the plaintiff's wages. The making of this stipulation was a prudent act on the part of the plaintiff, and if the defendant is compelled to pay the amount awarded to the plaintiff for wages, he must only look to his co-partners in the company for contribution.

The evidence of James B. Laidlaw, a disinterested witness for the plaintiff, residing at Waverly, is very important, inasmuch as it removes the only doubtful point in the plaintiff's case. Speaking from his own knowledge, he says; "the British Gold Mining Company did business there through Thomas Watson, their agent and manager." He had had transactions with that company, some of which he detailed. He said he recollected a deputation composed of several persons,

of whom he was one, waiting on Thomas Watson in September, 1875, to examine papers and documents concerning the British Gold Mining Company, in order to ascertain who and what they were; that Thomas Watson produced a document and read it, stating that Thomas Watson the elder, and he Thomas Watson the younger, E. H. Hartman and John Watson were parties concerned in the British Gold Mining Company; that the said Thomas Watson then handed the said document to him, and he, the witness, read part of it to the company present, who were quite satisfied that there was such a company, and, on their return, mentioned the fact to others; that J. R. DeWolfe of London was mentioned in the document as the owner or lessor of the property in which the four persons before named called themselves the British Gold Mining Company for the purpose of working the mine; that the witness had seen John Watson the defendant on the property and in his store, and had conversations with him in regard to his relations to the company; that John Watson on one occasion told him at the Halifax Hotel that he could not settle his (witness's) account till he returned to London, got a transfer of his lease, got clear of Hartman, and got the matter in his own hands, and when that was accomplished he would return to Halifax and settle all claims connected with the mines; that said John Watson told him several times he held 1–16th share in the company; that the company were indebted to him for goods supplied to the mine for which payment was made by cheque signed by Thomas Watson as agent of the company; that he had seen letters written by John to Thomas Watson when in England referring to the subject of the mine. In one letter he said he would be out in May and would be able to settle all claims against the mine.

At the close of the plaintiff's case John Watson, defendant, was called as a witness in his own behalf, and denied that any agreement of partnership was ever entered into between Thomas Watson, senior, Thomas Watson, junior, himself and E. H. Hartman, and said that he never gave any information to anyone at Waverly about the business of mining. He admitted he had 1–16th interest in the mine for guaranteeing the lease, but said there was no partnership such as had been stated in regard to the mine. On his cross-examination he

said that no one but his brother and himself were interested in the mine, that he had 1–16th share for guaranteeing De-Wolfe the rent, and did not know what his brother had, but believed he had 1–16th. He denied having any personal interest in the mine and stated that he never wrote his brother about the mining business at Waverley, and did not write him he would be out in May and settle the claims, and said he had signed the lease as guarantor. The evidence of the defendant has in no wise weakened the impression made upon my mind by the testimony of Laidlaw in respect to the partnership existing between the defendant and Thomas Watson and others, in the business conducted at Waverly under the name of the British Gold Mining Company, and, being satisfied that there was such a partnership, and that the secondary evidence of the document, &c., constituting that partnership was properly received, I am of opinion that there is no ground for disturbing the judgment of the learned Judge of the County Court in this case, which appears to me to be consistent with the evidence as well as the law and justice of the case; and I think the appeal must, for that reason, be dismissed with costs. As under chapter 9 of the Acts of 1877, sec. 25, no appeal is allowed from the decision of the Judge on disputed facts, it being alone confined to his decision upon any point of law, it was perhaps unnecessary to refer to the evidence in this cause as I have done, but, concurring as I do with the learned Judge both on the law and on the facts of the case, I felt it to be due to him to express that opinion.

IN RE ESTATE OF LAWRENCE ROCHE.

Upon proof of Testator's will in solemn form the Judge of Probate decreed that it had been duly executed, and he made the costs payable out of the estate. On appeal, the Court held that the will had been shown to have been duly executed, and that the due execution had been proved of a codicil which operated as a republication of the will. The appeal was therefore dismissed, but without costs.

WEATHERBE, J., dissenting as to the question of costs, considered that the appeal should be dismissed with costs.

THIS was an appeal from a decree of the Judge of Probate for the County of Halifax, affirming a will. The grounds of the appeal were that the will was not duly executed, and that the will had been procured by undue influence; but the second of these grounds was abandoned at the argument. The circumstances connected with the execution of the will are stated in the judgment of the Court, and the objections relied on appear fully in the argument which took place December 19th, 1878, before YOUNG, C. J., and SMITH, JAMES, and WEATHERBE, J J.

Rigby, Q. C., in support of appeal.—Five witnesses were called in reference to the execution of this will. One of these, the daughter of testator, was the principal legatee. Another was the solicitor who prepared the will, who is an executor and has a small pecuniary interest, and is professionally inclined to support his own professional work; *12 Moore P. C. C.*, 158. Again Mr. Power speaks doubtfully as to the fact of the testator being present when the two other persons, who signed as witnesses in addition to Mr. Power, signed the will, while the other two, disinterested persons, say almost positively that the testator was not present. Mr. Power only undertakes to say that all the formalities of the law were complied with; but he cannot swear where the will was executed, nor, from independent recollection, whether testator was present when the witnesses signed.

The widow swears that the Klines, the witnesses, were in the kitchen, and that her husband was in the bed-room, with the door between the two rooms shut the whole time they were there, to the best of her recollection.

On one side we have three disinterested witnesses swearing that the testator was not present when the witnesses signed

the will; on the other side we have only two witnesses, the daughter and Mr. Power, both interested.

Power, contra.—The will here is not unreasonable. The daughter, Mary, who has the bulk of the property, which is not large, is over fifty years of age and unmarried.

As to the evidence of execution, there is a strong presumption that the will was properly executed, apart from my own evidence. The evidence of the Klines themselves is contradictory. (WEATHERBE, J.—I would like to know whether the respondents had notice of the actual grounds on which it was sought to set the will aside. Were you taken by surprise by the evidence of these witnesses?) Yes.

There is no question here as to the signing of the will by the testator. The legal proposition applicable to the facts is that, when the subscribing witnesses do not recollect whether the testator signed in their presence and they in his presence and in the presence of each other, the presumption is that they did everything regularly. Cites *1 Williams on Ex'rs*, 87; *2 Curtis*, 371; *4 Moore's P. C. C.*, 419. In the case referred to by the other side, from *12 Moore's P. C. C.*, the Court decided against the evidence of the sole subscribing witness. See also *L. R., 1 P. & D.*, 678; *3 Swab. & Trist.*, 582; *Id.*, 200; *14 Weekly Reporter*, 901; *5 Fisher's Dig.*, 8805; *Id.*, 8804; *L. R., 1 P. & D.*, 375; *3 Curtis*, 157; *Id.*, 54; *Id.*, 547.

The codicil was duly executed, beyond question, and that validates the execution of the will, *1 Williams on Ex'ors*, 85; *11 Moore's P. C. C.*, 427.

With reference to costs, cites *Dodd & Brook's Law and Pract. of Court of Prob.*, 801, 805, 806, 809, 813, 814, 815, 817.

Richard Roche may have had sufficient cause to attack the will in the Court below; but not for appeal after the judgment below. Richard is simply seeking to benefit himself at the expense of his sister, by setting up another will under which he was principal beneficiary. *R. S.*, c. 90, s. 62; *James, N. S. R.*, 123; *1 Moore's P. C. C.*, 478; *3 Swab. & Trist.*, 35; *Id.*, 275.

Shannon, Q. C., in reply.—The question of costs is wholly in the discretion of the Court. The cases have been presented

to the Court several times this term. The most important case is that cited by *Mr. Motton* in the Heffernan Will case, (*ante*, 486,) from *43 L. J.*, 43, where the rules respecting costs are fully laid down. That is the latest case on the point. This is a case that required investigation. Although there is not the legal evidence of undue influence, yet there was such evidence of it as to raise reasonable suspicions in the mind of the party seeking to set aside the will.

Where any next of kin finds out that a will has been made shutting him out, he should properly endeavour to find out, from the subscribing witnesses, what he can as to the circumstances under which the will was executed. Cites *L. R.*, *1 P. & D.*, 630.

As to the evidence, you may eliminate the daughter's evidence and the widow's, as contradictory. Then you have the two Klines against Mr. Power. The two Klines say they did not see Roche sign the will, and that they did not hear his voice at all. (JAMES, J.—These witnesses have signed a document stating that they signed in presence of the testator and of each other.) But they swear they were simply asked to sign Mr. Roche's will, and accordingly put their names down. The leading case on this point is in *3 Swab. & Trist.*, 200; *Id.*, 578.

SIR WILLIAM YOUNG, C. J., now, (Feb. 1st, 1879,) delivered the judgment of the Court:—

The last will of the testator having been proved in solemn form, the Judge of Probate at Halifax pronounced by his decree that it had been duly executed, and that it had not been obtained by undue influence. From this decree there was an appeal, and, upon the argument, the second of these grounds was abandoned. There were three witnesses to the will, the Hon. L. G. Power, by whom it was drawn, and John and Thomas Kline whom he had called in for the purpose. Mr. Power says; "The testator executed this will in my presence, and in the presence of the other two subscribing witnesses. We saw him sign that will and he saw us sign it as witnesses. I saw that the formalities of the law were complied with." Evidence of this kind, given by a barrister known to us all, it is almost impossible to shake. It is confirmed by Mary Roche, the principal legatee, who says that

both the Klines were in the kitchen when the will was executed. There was a codicil made on the same day with the same three witnesses, as to whom the widow who was hardly dealt with, both by husband and daughter, and wished to upset the will says; "I saw the testator sign the codicil,—the Klines were called in to witness this also. I think they must have seen him sign that codicil." The Klines give no positive denial of these allegations. All their evidence is guarded by words of recollection and remembrance. They do not recollect that the testator was present. They cannot swear that they saw him on either occasion sign the will or the codicil. It is evident that such declarations cannot destroy the effect of their own acts in signing as witnesses and the clear and positive testimony to which they are opposed. The codicil, too, which the widow confirms, operates as a republication of the will. *Williams on Executors*, 18; *Rogers et al.* v. *Pittis*, 1 Add., 41; *Jansen* v. *Jansen*, 1 Add., 39.

The evidence as to the disposition of the testator's property, and the preference of an unmarried daughter to another, a widow with children who is cut off entirely, and to the sons, one of whom gets nothing and the other a very small share, accounts for the litigation, which the favoured legatee in fact expected, and no doubt induced the Court to decree that the costs should be paid out of the estate. This, I think, the Judge is not authorized to do for the reasons assigned in the case of Heffernan's will, but from this part of the decree there is no appeal; and, if there were, I should come to the same conclusion, under sec. 62 of our Act, R. S., chap. 90. I think, also, under all the circumstances, that the appeal should be dismissed without costs, leaving the oldest son, the appellant, to bear his own.

WEATHERBE, J.—I am of the same opinion that the decree must be sustained, but I differ in opinion as to costs. What is the case? Testator executed a will and a codicil on the same day. The only question raised on the appeal here was whether the witnesses together saw the testator when he executed these instruments. Mr. Power, one of the executors and a witness, testifies to the proper execution. He is a solicitor and drew the will. He had requested John and Thomas Kline, neighbours of testator, who were, apparently, strangers

to him, to witness the execution, and when the will was attacked, he called them to testify after he had given his own evidence. Neither of them, so they swore, remembered seeing the testator execute the will. Mary Roche, an executrix, testator's daughter, and the person chiefly benefited by the will, supported the statement of Mr. Power. The widow, who was dissatisfied with the disposition of the property, was called by the son, who attacked the will, and proved that the Klines must have seen the testator sign the codicil which was a republication of the will. One of the Klines swore in the Court below that they had both informed petitioners' counsel previous to the proceedings there, that, as they had testified, they could not remember whether they saw testator at the time they witnessed the will. I think, considering this statement of the Klines, even assuming that they had not made the same statement to petitioners' counsel that they made in Court, and taking into account the evidence of the widow as to the execution of the codicil, that there does not exist a sufficient reason to exempt petitioner from the costs of bringing the matter up to this Court.

McLELLAN *v.* BALDWIN.

PLAINTIFF obtained in the County Court an order, under R. S., cap. 94, sec. 44, for constructive service of a writ of summons on the defendant who was absent at the time in England. The affidavit on which the order was taken was substantially in these terms; "That said defendant is absent from the province, and is, as I am informed and believe, in Great Britain, so that personal service cannot be effected upon him, if at all, without great expense and inconvenience; that I have a good and available cause of action against defendant; that H. P. is the agent and partner of the defendant in this province."

Held, reversing the decision of the County Court, that the affidavit was not sufficient, but that it should have set out the facts and circumstances necessary to make it "appear to the satisfaction of the Judge," exercising his own judgment in the matter, that the case came within the terms of the statute providing for constructive service.

Foster v. *Evans* (ante p. 344) distinguished.

THIS was an appeal from a judgment of the County Court, District No. 1. The cause was one in which plaintiff procured constructive service on a defendant absent from the Province, under ch. 94, R. S., sec. 44. The defendant obtained an order *nisi* to set aside the service on the alleged agent, on several

grounds disclosed by affidavit, and on the ground that the affidavits on which the order for constructive service was granted were insufficient. The Judge of the County Court allowed the plaintiff, on the hearing of the motion to make the order absolute, to read supplementary affidavits as to the cause of action, and as to the relation of agency of the party served as agent. He discharged the order *nisi* with costs, and the defendant appealed. The appeal was argued December 20th, 1878, before YOUNG, C. J., and SMITH, JAMES and WEATHERBE, J J.

Ervin, in support of appeal.—The affidavit here as to the cause of action, and as to the agency of the person served, is insufficient. It should contain allegations of facts from which the Judge could satisfy himself, both as to the cause of action and the agency. The same rule applies here as in case of holding to bail; *Day's C. L. P. Act*, 53, 54 and 55; *1 Ch. Arch. Pr.*, 215.

Bligh, contra.—We have followed the language of the statute here in our affidavits. (WEATHERBE, J.—But the statute does not prescribe the language to be used in the affidavit. It says you must shew to the satisfaction of a Judge.) In *Foster* v. *Roome*. decided by this Court last term, (*ante*, p. 344,) the whole argument was similar to this. There I had followed in my affidavits simply the language of the statute, the Insolvent Act of 1875, to shew that the party was insolvent within the meaning of the act. The Court held there that the affidavits were sufficient. There is no hardship in upholding the constructive service here, because the statute allows the defendant to come in within three years after the judgment to set the judgment aside.

The *Attorney General*, in reply.—The statute should be strictly construed in favor of defendant, because any extended application of constructive service is against natural justice. The true meaning of the statute requires that the party served as agent should be either a special agent for the service of documents, or a general agent authorized to attend to all the absent person's business here. He must be such an agent as would be under a duty to communicate the fact of the writ to his principal. The statute is not designed to authorize service on an agent for a tort.

The allegation that the person served here was a partner of defendant, only makes him out agent of the partnership, and that within the scope of the partnership business. The Judge could as well have allowed the service allowed here in an action of ejectment, and, for all we know, the action was one of ejectment. The rule as to affidavits to hold to bail under similar statutory provisions is clearly defined; *1 Ch. Arch. Pr.*, 751-2; *Fisher's Dig.*, 5619; *Story on Agency*, 124-5.

The statute does not apply to actions of tort, because it provides for entering judgment immediately upon default, and does not provide for a writ of enquiry to assess damages, which requires to be returned within ten days; *R. S.*, ch. 94, sec. 56. See also sections 47 and 48.

Ervin.—Cites *ch. 23* of the Acts of 1872.

SMITH, J., now, (Feb. 1st, 1879,) delivered the judgment of the Court:—

In this cause an order was made by the Judge of the County Court for District No. 1, that service of a writ of summons, issued out of his Court against defendant, made upon one Preedy, as defendant's agent, should be sufficient. This order was granted under sec. 44 of cap. 94 of the Revised Statutes. The validity of this order depends upon the affidavit made by the plaintiff, upon which it was issued, and an application was made to the Judge below to set aside said order on the ground of the insufficiency of this affidavit. The Judge refused to set aside the order, and an appeal was allowed from such decision, and was argued before this Court.

The ground of such appeal is the insufficiency of the affidavit, inasmuch as it does not shew that personal service could not be affected on defendant, and that there were no *facts* testified to to *satisfy* a *Judge* that the plaintiff had "a good and available cause of action against the defendant," as required by the statute; also, that Preedy was not shewn by circumstances to have been an agent within the meaning of the act. It was also urged that the statute did not apply to cases of torts. There were supplementary affidavits received by the Judge below, and read on the argument, tending to fortify plaintiff's first affidavit, and to add facts and circumstances omitted from it, which, I think, were improperly

received, and which cannot be regarded by this Court as assisting the plaintiff.

We have, therefore, to consider only whether the affidavit of the plaintiff, on which the order was granted, is sufficient to justify it. It was urged with much weight by the Attorney General at the argument that this statute, under which the plaintiff seeks to sustain the order, is in restraint of natural rights, and, therefore, should be carefully guarded and construed. I so far concur in this view as to conceive it to be the duty of the Court not to extend the operation of a law, which is peculiar to our Province and which might work much injustice, one whit beyond its *positive* enactments.

The affidavit of the defendant is of the baldest character. It merely says, "the said defendant is absent from the Province . . . . that he is, as I am informed and believe, in Great Britain, so that personal service cannot be effected upon him, if at all, without great expense and inconvenience; that I have a good and available cause of action against the defendant; that Henry Preedy, of the City of Halifax, Merchant, is the agent and partner of the defendant in this Province, and is at the present time carrying on the business of the said John Baldwin and Henry Preedy in the City of Halifax under the style and firm of Baldwin & Company." For the purpose of our judgment it will be unnecessary to determine the question raised as to the application of the statute to cases of torts, although, as a *dictum* merely, I may say I see no restraining language in the act expressive of any limitation. I deal solely with the question of the sufficiency of the affidavit. The 44th section of the act appears to me to require something more than a mere statement by the plaintiff of what can only be his opinion, of his having "an available cause of action against the defendant," or that the person upon whom the service of the process is to be deemed sufficient is defendant's "agent within the Province." The act does not say that such an opinion, although expressed under oath, shall be sufficient; but it states that it must be "made to appear by affidavit to the satisfaction of the Court or a Judge," not only that the defendant is absent from the Province, "so that personal service cannot be effected on him, or that he is remaining abroad so as to evade service, and that he has an agent within

the Province," but also "that the plaintiff has a good and available cause of action against the defendant." Does the affidavit in this case meet these requirements? Does it contain *any facts* or circumstances upon which either the Court or a Judge can be satisfied *exercising his own judgment*, that the defendant is absent from the Province, so that personal service cannot be effected upon him, or that he is remaining abroad to evade service, and that he has *such an agent* within the Province as the statute contemplates; and also that the cause of action is "a good and available one?" I think it does not; and if the *satisfaction* of a Judge is to be grounded only upon the naked assertions of the plaintiff, then his discretion must necessarily be at an end, and the crude views of an interested layman as to what is a good and available cause of action, and what constitutes *in law* an agent, must be the guide to the application of the statute solely. To give such a construction to the statute would not only be irreconcilable with its language, but would be inconsistent with numerous and undoubted English decisions, where it has been held that under the 1st & 2nd Victoria, cap. 110, sec. 3, where it is enacted that "the plaintiff must shew to the satisfaction of a Judge that there is probable cause for believing the defendant is about to quit England, unless he be forthwith apprehended," the affidavit must, for this purpose, set forth the circumstances, in order that the Judge may determine whether there is such probable cause. Vide *Bateman* v. *Dunn*, 7 Dowl, 105; *5 Bing. N. C.*, 49; *Harvey* v. *O'Meara*, 7 Dowl., 725.

In *Bateman* v. *Dunn*, the affidavit was held defective, on the ground that it did not contain any facts upon which the Judge could exercise his judgment, and the language of VAUGHAN, J., in delivering his decision, is very unmistakeable. "I am of opinion," he says, "that under that section, the power being given to a Judge to determine whether there is probable cause for believing the defendant is about to quit England, unless he be forthwith apprehended, the question of probable cause must be determined, not simply on the belief of the party, but on facts from which the Court may draw a conclusion that such is his intention."

The principle thus enunciated seems, by analogy, so closely to resemble the case before us, that I think there can be no

difficulty whatever in adopting it, as being the result of a sound and reasonable construction of the act, and well adapted to induce prudence and discretion in administering it.

I am of opinion that the decision of the Court below must be reversed, with costs.

WEATHERBE, J.—This was an action commenced in the County Court. Afterwards, on the 23rd May, 1878, plaintiff made an affidavit "that this action was brought on the 17th day of May, instant; that the said defendant is absent from this Province; that the cause of action herein arose in this Province; that the defendant is, as I am informed and verily believe, in Great Britain, so that personal service cannot be effected on him, if at all, without great expense and inconvenience; that I have a good and available cause of action against the defendant; that Henry Preedy, of the City of Halifax, Merchant, is the agent and partner of the defendant in this Province, and is at the present time carrying on the business of the said John Baldwin and Henry C. Preedy, in the city of Halifax, under the name and firm of John Baldwin & Co."

Upon this the learned Judge of the County Court made an order that service of the writ on the said Preedy should be a good service on defendant. An application was made to that Court to set aside this order, on the grounds that plaintiff's affidavit did not shew (1) that personal service could not be effected on defendant, and (2) that plaintiff had a good and available cause of action against defendant.

It was also contended that Preedy was not an agent within the meaning of the act, and that the action, being for a tort, did not come within the statute. Affidavits were read for plaintiff respecting defendant's absence, the cause of action, and the nature of the agency, in resisting the application which was refused—the refusal of which is the subject of this appeal.

Section 44, cap. 94, of the Revised Statutes, (4th series) which is made applicable to the County Court, is as follows: —"In all cases when it shall be made to appear by affidavit, to the satisfaction of the Court or a Judge that a defendant is absent from the Province, so that personal service of process cannot be effected on him, or that he is remaining abroad so

as to evade service, and that he has an agent within the Province, and also that the plaintiff has a good and available cause of action against the defendant, the Court or a Judge may make an order for the service of process on the agent, which service shall be deemed good and sufficient service on the defendant; and the plaintiff may thereupon proceed in the action to judgment and execution as if such defendant had been personally served."

The affidavit upon which the order for service was made was fatally defective, and it is not, therefore, necessary to consider the affidavits read in shewing cause below. Plaintiff, by his affidavit, has not made it appear that defendant was absent, so that personal service could not be effected, nor that he had a good and available cause of action; and, therefore, no order could be made for service. It would be impossible to supply these defects by introducing affidavits afterwards to sustain an order not authorized by the statute. If there is anything about which Courts have always been most careful, it is to see that parties are properly served with process and have sufficient notice, before adjudicating upon claims against them or passing judgment which may deprive them of their liberty or their property. This is a case for strict construction.

Is it enough to shew that a party is absent from the Province to bring a case within this statute? Then if he goes anywhere over the borders of the Province to return in a few days, that would be sufficient to justify a service of a summons and declaration on an agent. The Legislature never intended that. It must be shewn that he is absent, so that personal service cannot be effected on him. The plaintiff has refrained from saying this. All he has said is that he is informed and believes defendant is in Great Britain, and that it will be expensive and inconvenient to effect personal service. It is not contended here that there was a desire to evade service—an evasion provided for by the statute. Are we to suppose that plaintiff could not have ascertained if he had not already known the whereabouts of defendant? We are not informed whether his residence is in this Province, or whether he intends to return. The plaintiff's affidavit amounts to this, that it may be possible to effect personal service, but, if so, it will be very expensive and inconvenient,—a case not

contemplated by the Legislature. Even assuming great expense and inconvenience were grounds, can it be said that there was any attempt in preparing the affidavit to satisfy a Judge of these things? How much expense, and for what, and what inconvenience? *Non constat* that the writing of a letter with directions and the enclosure of a Post Office order for a few dollars, and, it may be, an affidavit to be sworn before a Commissioner, would not have effected the object. Would that be great expense and inconvenience? I have no doubt whatever that on this ground the statute was not complied with.

It will be observed that by section 43, which in this respect coincides with the English act, it is necessary, before obtaining an order, to shew that "*reasonable efforts* have been made to effect personal service." Under section 44, plaintiff must shew "that defendant is absent, so that personal service *cannot be effected.*" I think the requirement under the latter section is more stringent than under the former. Plaintiff must shew,—that is he must set forth facts by which it will appear,—what efforts have been made to effect personal service, in order that the Judge may see that it is impossible to effect service. Under the English act the cases shew what efforts are sufficient, but, as no efforts whatever have been put forth in the present case, it is not necessary to decide whether "reasonable efforts" would be sufficient.

As to the cause of action,—what is the good cause of action which plaintiff has undertaken to satisfy the Court he has against defendant? The order for constructive service was made on reading the declaration. Could plaintiff have said that that declaration set forth his cause of action? He has not said so. How could perjury have been assigned—for should not this be the measure of the validity of the affidavit? —if it turned out that he had no such ground of action as the declaration set forth? There was nothing to satisfy a Judge that there was any cause of action whatever, except the statement in plaintiff's affidavit, and I do not understand how that which cannot be regarded as anything more than the mere opinion of a layman on what may be a very difficult legal question can be said to "shew" the thing "to the satisfaction of a Court."

The words of section 43 are substantially the same as those of section 44, on the subject of disclosure of the cause of action, and are identical with those of the English act. "The Court or Judge, upon being satisfied by affidavit that there is a cause of action," are the words of this act; and in *Chitty's Archbold's Practice*, p. 215, cited by plaintiff's counsel, commenting on these words, the author says; "The affidavit in support of the application should set forth the cause of action as in an affidavit to hold to bail." The affidavit to hold to bail should be such that perjury may be assigned on it, and whatever is necessary to shew the plaintiff's right of action must be expressly stated; *Ch. Arch. Pr.*, 751. The reason given by Archbold for strict construction of the statute is that it would not be safe otherwise to deprive a defendant of his liberty. The same reason applies here.

In the construction of the words, "shall be made to appear to the satisfaction of the Court or Judge," the same reasoning as applies to "the cause of action" is pertinent to the question of agency, and the affidavit is insufficient in that particular, I think. However, as in the rule *nisi* to set aside the order of service the question of agency was not raised on the ground of its having been insufficiently set forth in the affidavit, but on the ground of such agency as is contemplated by the act not having existed, and this is a question which would depend on the affidavits on both sides, it is not necessary to determine that matter to support the undoubted opinion I hold that the appeal should be sustained. Neither is it necessary to consider whether the words, "all cases," mentioned in the statute include actions of tort.

The case of *Foster* v. *Roome*, (*ante* 344) in which I understand my brother DESBARRES delivered the opinion of this Court before I occupied a seat here, was relied on, and I have read the copy of the decision supplied to me by plaintiff's counsel. There the Court reversed the decision of the County Court setting aside an order for attachment under the Insolvent Act. Plaintiff was required by the act to disclose such facts and circumstances as would satisfy the Judge of defendant's insolvency within the meaning of the act. The act declares that a debtor is to be deemed insolvent if he has called a meeting of his creditors for the purpose of compounding with them, or if he

has exhibited a statement shewing his inability to meet his liabilities, or if he has otherwise acknowledged his insolvency. Here, irrespective of the general provision for satisfying the Judge of the acknowledgment of insolvency, which might require facts to be set forth upon which he could exercise his judicial mind, as in this case, are mentioned two distinct matters of fact, not involving, it appears to me, questions of law to make them appear, either of which, on being shewn, requires the order for attachment to be made. In this respect that case is distinguishable from this, and there I would have arrived at the same conclusion as that which the Court reached.

WRIGHT *v.* REEVES.

A BAIL-BOND was taken upon a capias issued out of the Magistrate's Court, conditioned for the appearance of the defendant in the suit *or his authorized* agent. The attorney appeared with a written authority as "the authorized agent," and the plaintiff obtained judgment upon which an execution was issued and returned *non est inventus*. In an action against the surety, *Held* affirming the decision of the County Court, that the surety's obligation had been discharged by the appearance of the agent and that plaintiff could not recover against him.

THIS was an action brought on a bail bond, the capias having issued out of the Magistrate's Court. The bond was in the form given in chap. 91, R. S., with the exception of the following proviso; "if the above bounden Murdock McLellan *or his authorized agent*, shall appear before N. R. and J. F., at D., on the third day of June, at eleven o'clock, to answer to the suit of the above-named Ephraim Wright," &c. The words in italics are not in the form given in the statute, and were inserted before the surety signed the bond, as he declined to sign it otherwise. Mr. Hunt appeared at the trial before the Magistrates as McLellan's "authorized agent," with a written authority for that purpose, but took no active part in the trial, and judgment passed for plaintiff. McLellan left the County, and the plaintiff sued on his bond in the County Court at Halifax, where judgment was given against him. Plaintiff appealed, and the appeal was argued December 16th, 1878, before SIR WM. YOUNG, C. J., DESBARRES, MCDONALD, and JAMES, J J.

Harrington, in support of appeal, explains the clause inserted in the bond, and contends that the condition inserted was absurd and meaningless.

YOUNG, C. J.—This document is not a bond recognized by the law at all. The plaintiff has been deprived of his bail. The bond departs from the statutable form in an essential particular.

Harrington.—The defendant's appearance conditioned for in the bond means an appearance to respond the judgment by going to jail, if necessary. (The COURT.—Yes.) Then, as Mr. Hunt could not go to jail for him, that part of the bond must be treated as absurd and inoperative. Neither one nor the other has "answered to the suit" in the sense of the condition. Will not the Court hold the surety responsible that Mr. Hunt should respond the action?

The COURT.—We cannot do that. The surety declines to sign the ordinary bond, and he has done what he undertook to do.

Harrington.—I ask the Court to enforce the condition as contained in the bond. (The COURT.—We cannot do that.) Then the clause is absurd, and we should go on the balance of the condition. *Dacosta* v. *Davis*, 1 B. & P., 242.

The COURT decided to dismiss the appeal, reserving the question of costs, and the decision was afterwards put in writing and delivered, (February 1st, 1879,) by SIR WILLIAM YOUNG, C. J.

The plaintiff had one McLellan arrested under a capias from a Magistrate's Court for $42, and the officer admitted him to bail under chap. 91, sec. 11, but, instead of the usual bail bond, *Revised Statutes*, fol. 424, the condition of which is, that the defendant shall appear before the Justices, the words "or his authorized agent," were inserted at the request of the defendant; and this suit is brought upon the bond, he being the only surety. Mr. Hunt, who had nothing to do with the preparation or taking of the bond, appeared as the authorized agent of McLellan, but offered no defence, and, judgment having passed and execution issued against him, with a return of *non est inventus*, this action was brought against Reeves

upon the bond, and, on appeal, before us, from a judgment of the County Court in his favor.

The bond essentially differs from the form in the statute, and the surety has fulfilled the condition in it. How then can he be held responsible? It is not, in fact, a bail bond, and has none of the qualities of it. That it defeated the end for which a bail bond is given, and was discharged by a condition that was nugatory and useless, is the misfortune of the plaintiff, and the fault of the party who accepted the bond.

The only case cited at the argument, *Dacosta* v. *Davis*, 1 B. & P., 242, has no relation to this case. That was the case of a special, not of a bail bond, where it was held that the first part of the condition was void as providing for the second arrest of a party who had been discharged from an execution, and that, under the other part of the condition, the bond was forfeited. Two or three other cases have some bearing upon it. In *Fuller* v. *Prest*, 7 T. R., 109, it was held that the Sheriff's officer having acted contrary to his duty in accepting an undertaking for the appearance of the party arrested, in place of a bail bond, without the plaintiff's assent, and bail above not having been duly put in, the Sheriff was liable in an action for an escape. In *Copley* v. *Medeiros*, 7 M. & G., 426, the words, "on promises," having been omitted in the copy of the writ of capias delivered to the defendant, the bail bond was set aside by reason of the variance. In *Price et al.* v. *Moulton*, 10 C. B., 561, it was held *inter alia* that a party joining as surety in a bond ought to be informed of the nature of the obligation, the name of the obligee, and the relation in which he stands to the principal obligor.

The defendant, therefore, as against whom no collusion is charged, had a right to limit his obligation as he did, and, as it was accepted in that form, this appeal must be dismissed with costs.

THE QUEEN *v.* TOPPLE.

The prisoner, not having been in the employ of the prosecutor, was sent by him to one Milner with a horse as to which Milner and the prosecutor, who owned the horse, had had some negotiations, with an order to Milner to give the bearer a cheque if the horse suited. On account of a difference as to the price, the horse was not taken, and the prisoner brought him back. Afterwards, the prisoner, without any authority from the owner, took the horse to Milner and sold it as his own property, or professing to have the right to dispose of it, and received the money, giving a receipt in his own name.

Held, that a conviction for embezzlement could not be sustained, as the prisoner, when he received the money, did not receive it as a servant or clerk, but sold the horse as his own, and received the money to his own use.

THE prisoner was tried before SIR WILLIAM YOUNG, C. J., and convicted upon an indictment for embezzling money received by him for the sale of a horse belonging to one Hamilton. On the 24th of December, 1877, Hamilton sent the prisoner,—who had not been his servant except on this one occasion,—with the horse to a Capt. Milner, with an order requesting Milner to give the bearer a check payable to the order of Hamilton & Co. if the horse suited. Milner did not take the horse, owing to a difference as to the price, but afterwards sent Hamilton a check for a smaller amount which Hamilton refused. In the evening of the same day the prisoner, without any authority from Hamilton, returned to Milner and undertook to sell him the horse, alleging that it was his own property, or that he had a right to dispose of it, and Milner purchased it from him and paid him his price, for which the prisoner gave his own receipt. The next day Milner sent his groom and took the horse, which he retained until the 27th December, when Hamilton, having learned on the 26th that the horse had been taken, sent to Milner for the price, and discovered that the prisoner had received the money. Topple retained the money to his own use, and did not inform Hamilton that he had received it, or account for it in any way. His Lordship reserved the question for the consideration of the Court, whether, under the facts, the prisoner could be convicted of embezzlement, and the point was argued this term.

Graham, for prisoner.—The prisoner was convicted of embezzlement under the charge of the Chief Justice, that if the prisoner was employed by the owner to sell the horse, the

money paid by the purchaser was that of the owner, and, the prisoner having appropriated it to his own use, they would be justified in finding embezzlement.

Sec. 70 of the Acts of 1869, cap. 21, is borrowed from the English statute. They had a previous English statute, somewhat different. It had the words "shall by virtue of such employment," &c. When Topple received the money, having disobeyed the order, and having received a check, it was a sale by the man Topple himself, and he then was not in the employ of Hamilton and was not receiving money for him. He may have been receiving money under false pretences, or he may have committed a larceny. But he was not Hamilton's servant.

The order was; "Please give the bearer a check for $120, payable to our order if the horse is suitable, and oblige, T. F. Hamilton." He sold the horse himself and gave a receipt in his own name, "*Isaac Topple.*" Milner received a message from Hamilton, upon which he said he would have nothing to do with the horse, but afterwards bought him from Topple. He took the risk and paid for the horse as Topple's horse. The money was never Hamilton's money. It must be considered a sale by Topple himself, perhaps in fraud of the owner, perhaps a larceny. *2 L. R., C. C. R.*, 28; *9 C. & P.*, 27; *Stevens' Dig., N. B.*, 124.

Shannon, Q. C., contra.—The questions for the Court resolve themselves into these,—was the prisoner the servant of Hamilton, and did he as the servant of Hamilton receive the money in question. *Stephens' Dig. of Crim. Law*, 231, Art. 297, Art. 309. The jury have passed upon the question whether the prisoner was a servant, and have found that he was. *Stephens' Dig., Cr. L.*, 242, 243. Hamilton employed Topple for the particular purpose of selling the horse. *L. R., 2 C. C. R.*, 150; *Queen* v. *Gale*, L. J. R., 1877, 133; *Stephens' Dig., Cr. L.*, Art. 311; *Archbold's Crim. Ev.*, 475.

Graham, in reply, comments on the cases already cited. The case relied on by Mr. Shannon, *Queen* v. *Gale*, was on a check. The prisoner there changed a check and retained the money. Here the prisoner sold a horse, which was a very different case. The sale by Hamilton was for a check to be

received. The sale actually made was unauthorized. The horse remained the property of Hamilton, and the money was the money of Milner, and the only indictment that would lie would be for obtaining money under false pretences, *i. e.*, money of Milner. The sale was unauthorized further, being for a different price from that authorized by Hamilton, and the payment being in money instead of a check, as ordered by Hamilton. There is no evidence of conversion of the money.

JAMES, J., now, (February 1st, 1879,) delivered the judgment of the Court:—

The prisoner was tried and found guilty at the last spring sittings at Halifax before the Chief Justice, for embezzlement of a sum of $125.25 received by him as the servant of one Thomas F. Hamilton. The case comes before us on the question reserved by the Chief Justice, "whether, under the facts, he ought to be convicted and punished as for an embezzlement."

The prosecutor, Hamilton, owned a horse which he boarded at Brown's stables. The prisoner was not employed as the servant of Hamilton except on the present occasion. In the forenoon of the 24th December, 1877, Hamilton sent the prisoner with a horse to Capt. Milner, with whom he had had some previous negotiation, with the following order: "E. C. Milner, Esq.,—Please give bearer cheque for $120 payable to our order if horse has suited, and oblige, yours, etc., Hamilton & Co."

The prisoner took the horse to Capt. Milner who did not take the horse owing to a small difference as to the price; and the prisoner brought back the horse, saying to Hamilton that Milner had no cheque. In the afternoon of the same day Milner sent his servant to Hamilton with a tender of $118.50 as the price of the horse, which Hamilton refused. Between 5 and 6 o'clock the same evening, without any authority or permission from Hamilton, prisoner returned to Capt. Milner and undertook to sell him the horse, alleging it to be his own property, or that he had a right to dispose of it; and Milner purchased it from him and paid him the price, viz., $120, and $1.25 in addition, for one-half of the veterinary surgeon's fee, Topple giving his own receipt therefor. Milner also paid him

for the horse's maintenance until the next day, when he sent his groom and took the horse from the stable, and retained it until the 27th; when Hamilton, who, having learned on the 26th that the horse had been taken, sent to Milner for the price, and then learned that Topple had received the money. This money the prisoner took to his own use. He did not inform Hamilton that he had got it, or account for it in any way.

The learned Chief Justice directed the jury that "if they were of opinion that the prisoner had been employed only on this occasion by the owner of the horse to sell him, that the money paid to him by the purchaser was the money of Hamilton, the owner, and that if the prisoner had appropriated it to his own use they would be justified in convicting him;" and he reserved the points of law.

It was contended on behalf of the prisoner that he was not in fact, or in law, the servant of Hamilton in this transaction, and therefore his selling the horse and receiving the money was entirely unauthorized, and the money received by him was not the money of Hamilton, but of Milner, and the offence not embezzlement. The cases cited were *Queen* v. *Cullum*, 2 C. C. R., 28; *Fisher's Digest, 1873*, p. 102; *9 C. & P.*, 27; *Stevens' N. B. Dig.*, 124. *Shannon, Q. C.*, for the Crown, cited *Stephens' Crim. Dig.*, p. 231-2, Art. 297, and cases; *Queen* v. *Negus*, L. R., 2 C. C., R., 34; *Stephens' Crim. Dig.*, p. 242, Art. 309; *Queen* v. *Foulkes*, 2 C. C. R., 150; *Queen* v. *Gale*, 46 Law Journal Rep., (1877,) 134; *Arch. Crim. Ev.*, 475.

I have examined all these cases, but, under the view which I take of the facts, most of them are inapplicable. This case is distinguishable from most of them by the circumstance that the service of the prisoner to Hamilton had terminated. Not being in Hamilton's employ, as his clerk or servant, he was simply sent as a messenger to convey the horse and the order to Capt. Milner, and bring back a cheque payable to Hamilton's order, if Milner decided to keep the horse. He took the horse and brought it back, and there his whole service ended. His going to Milner and bargaining away the horse to him afterwards was unauthorized, and therefore did not transfer the property to Milner; nor was the money which

he received the property of Hamilton, but of Milner, and therefore it was not embezzled from Hamilton. Hamilton, the only witness on this point, expressly denies having given any authority to the prisoner to interfere with the transaction after he brought the horse back, and none of the cases go the length of holding the offence to be embezzlement, when the relation of clerk or servant did not exist. Whether the prisoner was guilty of the offence of obtaining money under false pretences from Capt. Milner, it would be out of place to comment on here, as we are informed that there is an indictment pending against him for that offence, and the proper time to discuss that question will be on the trial of that indictment. I am of opinion that the verdict should be set aside.

McDONALD, J.—After the terms of sale proposed by Hamilton were declined by Milner, the latter refused to purchase the horse in question on any terms, as the property of Hamilton; but, the defendant having represented that the horse was his own, Milner agreed to purchase the animal as the defendant's property. He did not purchase upon the terms proposed by Hamilton, and the defendant had no authority to sell otherwise. The money was paid not for the use of Hamilton but for that of the defendant. Under these facts I do not think that the property passed to Milner, who voluntarily returned the horse to the rightful owner, Hamilton. If he had refused to do so, could Hamilton have recovered possession in an action at law? I think he could; and, if so, the money said to have been embezzled never was Hamilton's money at all;—and it follows that the prisoner cannot be punished for embezzling that money as the money of Hamilton.

WOODWORTH *v.* BORDEN.

A petition against the return of the respondent, headed "in the Election Court; Controverted Elections Act, 1874, &c.," was filed in the office of Martin I. Wilkins, as clerk of the Court, and served upon the respondent by the petitioner. The rules adopted by the Court prescribed that the petition should be filed with the clerk of the Election Court, and the act, by section 40, required the petition and notice, "with a copy of the deposit receipt to be served as nearly as may be in the manner in which a writ of summons is served in civil matters." Respondent denied that any copy of the deposit receipt had been served upon him and was contradicted by the petitioner's affidavit. Mr. Wilkins' appointment was made by a record substantially in these terms; "Record of the proceedings of the Supreme Court of Nova Scotia as constituted a court for the trial of controverted elections by 37th Vict., c. 10, entitled, &c. The Court opened and organised, present, &c. The Court appointed the prothonotary Martin I. Wilkins to be clerk of the Court under the provisions of the statute in that behalf.

Held, that the act,—the Controverted Elections Act of 1874,—was not *ultr vires*, that, although the petition would have been more properly headed in the Supreme Court, the heading "in the Election Court," followed by the words, "the Controverted Elections' Act, 1874," was unobjectionable, (or, *per* Sir Wm. Young, if objectionable, the objection was completely cured by the rule of the Court discountenancing merely formal objections,) that the petition had been filed with the proper officer and could not, as respondent contended, have been properly filed with the clerk of the Election Court organised under the statute of 1873, as that Court was defunct; that the service of the petition was bad, as it should have been made by the Sheriff, and that the burden of proof of the service of the deposit receipt rested upon petitioner, and had not been made out to the satisfaction of the Court; that these defects were not remedied by the rule as to merely formal objections, and had not been waived by the respondent; and that no circumstances had been shown to justify the enlargement of the time for service, even assuming that the Court had the power to enlarge it after the expiration of the time for service limited by the rules.

The petition was set aside without costs, as petitioner had succeeded on nearly all of the eighteen grounds taken against him in the rule *nisi*, and the two grounds on which he had failed came fairly under the head of new points of practice.

This was an election petition against the return of the respondent, the sitting member. A rule *nisi* was granted by James, J., to set aside the petition and service on eighteen grounds, the most important of which were substantially as follows:—That the petition should have been filed with the Clerk of the Election Court, who, it was contended, was Mr. Russell, the Clerk of the Court organized under the Act of 1873; that the Dominion Parliament could not prescribe procedure for a Civil Court of this Province; that the petition should have been entitled "in the Supreme Court," and not "in the Election Court;" that the petition had not been filed with the proper officer, Mr. Wilkins, the Clerk, not having been legally appointed; that the petition had not been properly served, not having been served by the Sheriff, but by the petitioner himself; that no copy of the deposit receipt had been served on the respondent, and that the Parliament of Canada had no power to create an Election Court.

The rules adopted by the Judges, entitled, "General Rules of the Supreme Court in relation to Controverted Elections," prescribed, among other things, that presentation of an election petition should be made by leaving it at the office of the Clerk of the Election Court.

The rule was argued December 13th, 1879, before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J.

Rigby, Q. C., for petitioner, took a preliminary objection that the rule and the affidavits on which it was founded were headed "in the Supreme Court," and should have been headed "in the Election Court."

Graham, for rule.—Under the Dominion Controverted Elections Act of 1874, the Court for the trial of election petitions is the Supreme Court of Nova Scotia. See Acts of 1874, chap. 10, sec. 3. The English Act, 31 & 32 Vict., c. 125, to be found in *Hardcastle*, Appendix, p. 1, is similar in the form of expression, *i. e.*, "the Court shall mean," &c. In England the Court shall mean "the Common Pleas." Under the English rules the form of petition is prescribed, and the proceedings are directed to be entitled in the Common Pleas. Their Lordships who framed those rules interpreted the act when they framed those rules, and no doubt considered what the statute meant when it said, 'the Court shall mean the Court of Common Pleas.' The English Judges made their rules in accordance with the act, and our Court should have done so and directed that the petition and proceedings should be headed in the Supreme Court.

The rules in Ontario under the Controverted Elections Act of 1873, are found in *34 U. C., Q. B. R.*, 291. In those rules the Court is spoken of as the Election Court. The Canada rules under the Act of 1874, are in *36 U. C., Q. B.*, 441; see form of petition, Ib., 442. In those rules, under the Act of 1874 the Election Court is not mentioned at all. The Judges had no power to create a Court. The Election Court is not known to the law at all. What would be done where a witness refused to obey a subpœna of the Election Court? If it is the Election Court here it is the Election Court in the other Provinces, because it is under the same statute. If the Legislature intended that the Court should be called the Election Court, the name would have been filled in in the schedule, giving the

form of affidavit, but all that it says is,—"In the (*name of the Court,*)" because in one province it is one Court, and in another another. Here it is in the Supreme Court. See Act of 1873, cap. 28, sec. 6, sub-sec. 3, page 116.

YOUNG, C. J.—Why do you come here if the petition is not in this Court?

Graham.—Because this is the only Court that has jurisdiction in the premises. I have come to this Court as the Supreme Court, because it has jurisdiction in election matters, and there is a dangerous paper on file with the Prothonotary of the Supreme Court purporting to be an election petition. The rules in relation to Controverted Elections provide that presentation shall be made by filing with the Clerk of the Election Court. This is the Supreme Court, and there is another Court, which is the Election Court, with the clerk of which the rules direct that the petition shall be filed. At the time the rules were adopted there was no clerk appointed by the Judges of this Court. The only clerk of the Election Court was the clerk of the Court composed of the Judges *ad hoc*, acting under the Act of 1873. This Court has said, by its rules, that the petition should be filed with the clerk of that Court.

Woodworth.—The rule appointing Mr. Wilkins was February 13, whereas the rules are dated March afterwards.

Graham.—Then I have to compare the authority of the general rule, stating that the petition shall be filed with the clerk of the Election Court, with the order appointing Mr. Wilkins. The statute says that the officer must be *prescribed*, and that *prescribe* means by rule of Court. The only thing prescribed by the rules is that the presentation shall be by filing with the clerk of the Election Court, who is Mr. Russell. The record appointing Mr. Wilkins has no validity against the rule prescribing who shall be the clerk. It has not been sent to the House of Commons.

The service of the petition in this case was bad. Section 40 of the Act of 1874 shows how it must be served. The service must be by the Sheriff or Deputy in this Province. If election petitions can be served by the party, so may writs of summons. No copy of the deposit receipt has been served at all. That is required by the act. Should it be decided that this is not necessary it will never be done hereafter. 7

Dowl., 68; *2 Dowl., N. S.*, 974. Notice under section 9 of the act should have been endorsed on the petition. *7 Dowl.*, 68; *2 Dowl., N. S.*, 974; *13 M. & W.*, 149; *4 Dowl., P. C.*, 290; *9 Dowl., P. C.*, 213; *Ch. Arch.*, 193, 191.

The act under which the petitioner is proceeding is *ultra vires*, see B. N. A. Act, sec. 92, sub-sec. 14. Section 101 provides that Parliament can create an additional Court, as they did in 1873, but they have no power to enact that the Supreme Court of this Province shall try election petitions, as that is matter of procedure. Under sec. 129, B. N. A. Act, only the Provincial Legislature would have power to alter a Provincial Court.

Woodworth, contra.--We are brought into a Court that has no jurisdiction in this case. The petition is in the Election Court, as the rules required it should be. The affidavits in reply to the rule are of course headed as the rule. The *ultra vires* question has been adjudicated upon elsewhere. Section 101 of the B. N. A. Act enables the Dominion Parliament to establish additional courts. The Act of 1874 substituted a new court for the one established under the Act of 1873. I cite section 3, sub-sections 2 5, 6 and 7; sections 45, 46, 47, 48 and 67, of the Act of 1874. These sections show that a new court was established. The Legislature took out of the hands of the House of Commons the trial of elections, and gave the Judges of the Supreme Court power to nominate Judges to compose a court. If this was the Supreme Court, and not the Election Court, it would not have been necessary to define the duties of the Judges, as is done by section 46. They could have made any parties the court, they have made the Judges of the Supreme Court an Election Court.

The deposit of security and receipt therefor are proved by Mr. Wilkins's affidavit. Wilkins, in another affidavit, swears that he is clerk of the Election Court. The learned counsel for respondent says he has searched, but he omits to mention that he found a book of proceedings in the Election Court, and a petition of Tremain, in which his own partner, for petitioner, moved for a trial.

Under section 44 of the Act of 1874, and sub section of section 4, explaining what rules of Court mean, the Court can make all rules required for the effectual execution of the Act.

The rules required that the petition should be in a prescribed form, which it did follow, and that it should be left with the clerk of the Election Court, which Mr. Wilkins swears he was. If that affidavit is true, what becomes of the contention that Mr. Russell is clerk of the Court? The act under which he was appointed is repealed by the Act of 1874, except as to business of the old court unfinished. How then could he receive this petition under the new act?

As to the deposit receipt, the respondent swears that no copy of the deposit receipt, as required by the act, &c., has been served upon him. What he means by the clause, as required by the act, I don't know, but I sent him the deposit receipt.

As to service, it is contended that I should have served it through the Sheriff. How could he have sworn that the paper he served in Kentville was a copy of the paper I filed in Halifax? It is not required. See sec. 9. In the case of the petition against Sir A. J. Smith, the objection was taken that the petition was served, not by the petitioner, but by the Sheriff.

Rigby, Q. C.—In reference to the first class of objections, I assume for argument that the Court has been mis-called, and should have been Supreme Court. I do not think that is a vital objection. An affidavit would be good headed in the Supreme Court of Nova Scotia. The strongest test is the heading of an affidavit. As to what would be sufficient in regard to heading an affidavit, see *Ch. Arch.*, 1612; *4 Bing.*, 101; *11 M. & W.*, 816. In view of these sections, especially with the rule of the Court against formal objections, the petition is good. It distinguishes the Court as the Court constituted under the Controverted Elections Act of 1874. The Judges have the power to make rules which shall have the force of law.

The next point is that the Parliament legislated in reference to matters of procedure. My answer is that they have created a distinct Court, as shown by the several sections of the act. The House of Commons, having a right to try its own members, could delegate that authority. A *fortiori* the Legislature could delegate it. Having passed an act they have exhausted the powers given them by the B. N. A. Act, and, if

this act is *ultra vires*, the power to try election in cases is gone.

Section 47 provides specially for the manner in which the expenses of the Judge, &c., are to be paid. If he was the Judge of the Supreme Court, he would be received as a Judge of the Supreme Court. If this is the Supreme Court there could be two Supreme Courts sitting at the same time in the same county. We say in such a case there would be a Supreme Court and an Election Court, one a Court of the Dominion, and the other a Provincial Court.

There appears to be a direct contradiction as to service of the deposit receipt. If there is such a conflict the Court should accept the statement of the petitioner that it was served. But there is no real conflict. The affidavit of Borden is that the said paper writing, &c., are the only papers served upon him, *i. e.*, he is advised that the others were not served, because not by the Sheriff.

The provision as to service is only as to the *manner*, not the person who shall serve. Section 107 of the Insolvent Act, as to service of attachments, provides that they are to be served as an ordinary writ of summons, yet they are served by the official assignee, not the Sheriff. The service of the receipt is an unimportant matter. Section 40 says that the petition shall be served by the Sheriff, or in such other manner as *prescribed*, *i. e.*, by this act or by the rules of Court. Here it is prescribed by the act, in section 9, how the petition may be served, and it is quite similar to the English Act. *Hardcastle*, p. 9. If the only way of serving was under sec. 40, the respondent would have fourteen days. If it is considered that there is defective service, the time should be extended for service.

Ritchie, Q. C., in reply.—It cannot be contended that any new Court has been established. There is not a word in the act about the Election Court, or the Court for election purposes. If this is a separate Court, why are the rules headed, "rules of the Supreme Court?" They would be rules of the Election Court. If there is not a separate Court, then these proceedings are wrongly headed. They must be headed in the Court to which they belong. The rules cannot create a

Court. The rule appointing Mr. Wilkins is not regularly made. The Court cannot make rules. It is only a majority of the Judges. The rules should have followed the rules adopted in other Provinces, and directed the proceedings to be headed in the Court to which the jurisdiction was given. This Court, when adopting rules, has recognized the fact that they were not organizing any new Court, as they have headed the rules, "rules of the Supreme Court in relation to controverted elections," or words to that effect; but they have improperly adopted the rules of the Ontario Judges, adopted under the Act of 1873, which did constitute a separate Court for the trial of election petitions. Cites *30 U. C., Q. B.*, 139.

The petition should have been filed with the clerk of the Election Court, meaning the Court appointed under the Act of 1873.

DESBARRES, J.—I do not see how it can be contended that this petition should have been filed with an officer appointed under an act which has been repealed except as to old unfinished business of that Court.

Ritchie, Q. C.—I contend that the time for serving the petition cannot be extended after the time provided in the act has elapsed. The application for time has to be made before the expiration of the time limited by the statute.

As to the question as to the constitutionality of the act, the act not having constituted a new Court, but simply having given the jurisdiction in such cases to an existing Provincial Court, and yet affecting to regulate the procedure of that Court, is *ultra vires*, under section 92, sub-section 11, of the B. N. A. Act.

MCDONALD, J.—The Insolvent Act regulates the procedure, and yet has never been attacked as *ultra vires*.

Ritchie, Q. C.—There a new Court was created, and that is precisely the distinction. The Parliament could have constituted a new Dominion Court and regulated its procedure.

Rigby, Q. C.—The Insolvent Act constitutes a Court in no other manner than the Controverted Elections Act of 1874, that is by defining what "the Court" shall mean.

SIR WILLIAM YOUNG, C. J.—The Dominion Parliament could not legislate effectively upon any subject coming within

its power, if it could not regulate procedure as to such matters in the Courts to which it gives the jurisdiction.

JAMES, J., now, (Feb. 1st, 1879,) delivered the judgment of the Court:—

The respondent, Frederick W. Borden, having been duly returned as elected for King's county, in this province, in the general election held on the 17th September last, the petitioner, Douglas B. Woodworth, on the 11th day of November, filed in the office of Martin I. Wilkins, Esquire, clerk of the Court, a petition against the return of the respondent, and made the deposit of $1000, as required by the Controverted Elections Act of 1874. The petition is headed, "In the Election Court, the Dominion Controverted Elections Act, 1874, &c." This petition was served upon the respondent by the petitioner in person on the 11th November.

This matter comes before us on an order *nisi* granted by me on the 18th November last, which I made returnable to this Court on the first day of the present term,—viz., 10th December,—on eighteen grounds. I omit reference to such as claim that the petition should have been filed with the clerk of the Election Court organized under the Act of 1873, because that Court is long since defunct. The Act under which it was constituted was repealed four years ago, and all the business in that Court has been, so far as I, (who had the honor to be one of the judges of that Court,) know or believe, settled by adjudication or long since finally abandoned. If this Court is not, in fact and in law, the Court for the trial of controverted elections for the House of Commons I know of no other in this province. The objections taken on this foundation are quite unnecessary, and do not strengthen the petitioner's case.

The remaining objections which were relied on in argument by respondent's counsel, may be reduced to five. (1.) That the Dominion Parliament cannot prescribe proceedings for a civil court of this province. (2.) The petition should have been entitled "In the Supreme Court," not "In the Election Court." (3.) The petition was not filed with a proper officer, Mr. Wilkins not having been legally appointed. (4.) The petition was not duly served, having been served,

not by the sheriff, but by the petitioner himself. (5.) That no copy of the deposit receipt was served on respondent. I will consider the objections as thus summarized *seriatim*.

Objection 1. Although it was not contended at the argument that the appointment of this Court as a judicial tribunal for the purpose of trying controverted elections in this province was beyond the power of the Legislature, as was contended in the Niagara case, the decisions in which are before me, yet it was urged in behalf of the respondent that, this being a civil court of the province, the regulation of its procedure was under the exclusive jurisdiction of the Provincial Legislature under s. 92, s. s. 14 of the B. N. A. Act. I am not of this opinion. Section 91 of that Act gives a general legislative jurisdiction to the Dominion Parliament, and the powers vested in the Local Legislature in sec. 92 are exceptions from the generality of that section, and are described in the concluding clause of sec. 91 as "matters of a local or private nature." Sec. 92, sub-sec. 14 enumerates among the subjects of local legislation "procedure in civil matters in those courts," that is "the provincial courts," and sub-sec. 16 says, "generally all matters of a merely local or private nature." If this is a matter of that kind the Dominion Parliament has no right to legislate upon it, and the anomaly is presented to us of a court—constituted for the purpose of transacting business pertaining to the political constitution of the Dominion Government, the most important business that could come before any court in the Dominion,—and that court left like a ship without rudder or compass, without any rules or regulations to direct its proceedings. I do not think any lengthened argument is required to get rid of this absurdity. It appears to me plainly from the conclusion of sec. 91 and by sub-sec. 16 of sec. 92 that the whole of the matters enumerated in sec. 92 are of a private and local nature, and subsection 14 must be construed as if the clause had expressly said "including procedure in civil matters of a merely private and local nature in those courts." This is clearly the correct and proper reading of the clause when these two correlative sections are read together. This jurisdiction, being not at all of a private local character but a matter affecting the Government of the Dominion, is therefore included under the general

language of the first clause of sec. 91 as being for the "good government of Canada." I think nothing but an inspection of the statute and a correct statement of its language is necessary to determine this question. I am therefore of opinion that the Dominion Parliament had the power to regulate the procedure of this court in election cases, as they have assumed to do in the Act of 1874, and as has been done by several other Acts of the Dominion Parliament in respect to the customs duties, the fisheries, and especially by the Insolvent Act.

The Chief Justice of the Common Pleas of Ontario, in his very able dissenting judgment in the Niagara case, rebuts this argument, as regards the Insolvent Court, by the fact that in that province in Insolvency before Confederation the Judge of the County Court had that jurisdiction already under the Provincial Statutes, and the Imperial Parliament does not interfere with the "jurisdiction," (or we may substitute "procedure,") "of the Provincial Courts, but has merely made use of them as it is entitled to in respect of matters *already within their jurisdiction.*"

The facts were quite otherwise in this Province. The Insolvent Act of 1869 gave the jurisdiction in this Province to the Judge of the Probate Court, as we had as yet no County Courts. When County Courts were subsequently established, the Act transferred the jurisdiction to them; but, at the time the Act passed, the Probate Court had never had any such jurisdiction. If the legitimate power of the Legislature of the Dominion did not authorize it to prescribe, as it did, forms and modes of proceedings, all the important proceedings in insolvency in this province, during the last nine years, are void and of no effect. I must have cogent reasons, indeed, to bring me to this conclusion.

The second objection was much relied on at the argument. It divides itself into two questions,—*(a)* Is the heading, "In the Election Court, the Dominion Controverted Elections Act, 1874," the proper designation of the Court. *(b)* If this is not the proper heading, is it a sufficient heading to satisfy the law? It is argued that it is not, because there is in law no such court as an "Election Court" for the purpose; that the Act of 1874 does not mention an "Election Court," and that,

while the Act gives to the Judges of this Court, *qua* individuals, certain powers, it does not contemplate that they shall act in a combined or collective capacity as an Election Court.

It is admitted, if I understood the argument, that the petition would have been properly headed, "In the Supreme Court," but that these words would in that case have signified not the Court as a Court, but a collection of individual judges. There is some apparent force in this argument. No doubt the Act is so drawn that most of the functions it prescribes may be fulfilled by a single Judge, and even the framing of the rules is given, not to the Court as such, but to the Judges as individuals. A sufficient reason for this may doubtless be found in the fact that in Ontario the rules are to be made (under sec. 44 and sec. 3, sub-sec. 2,) by the Judges of several distinct courts, which precludes the idea, in that province at least, of their being passed by any one court *eo nomine*. I think that the language of that section, (sec. 3, sub-sec. 2,) is very significant. It says that the expression, "the court," as respects elections, "shall be in Nova Scotia the Supreme Court for that province," that is, there shall be a Court as respects elections," and that court shall be "the Supreme Court" in this province. We find also repeated references to the Court acting as a court in its collective capacity, *e. g.*, sec. 7, which says that, "each of *the said Courts* shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with reference to an election petition as if such petition were an ordinary cause within its jurisdiction;" and sec. 9 permits an order in a cause to be made by "the Court or a Judge thereof." In the Province of Ontario the jurisdiction is given, not to the Judges of the several Courts, but to "any of the following Courts." The fact that under sec. 4 the clerk of the "court for election purposes" may be a different person from the officer filling that position in relation to its ordinary business, has an important bearing on the argument, as shewing that the Court, when employed on election business, although composed of the same Judges, is not only a Court sitting and acting as such, but another and different Court from what it is in relation to other business. This was the principle of the Act of 1873, and I do not see any sufficient

indication in the Act of 1874 of an intention to alter the law in this particular.

I think the Legislature, if it intended to alter the principle on which the tribunal was constituted, ought to have done so by express words or very clear implication. I can see neither in this Act. I consider, therefore, that this Court is "a Court as respects elections," that it acts in that capacity, as did its predecessor under the Act of 1873, as a Court of the Dominion; and that the Dominion Legislature had power to prescribe its mode of procedure.

It is my opinion that the more proper heading for proceedings in the Court is that which both parties have adopted in the subsequent proceedings, viz., "In the Supreme Court." At the same time I consider the heading here, even had it been confined to the words "in the Election Court," quite sufficient under the cases cited; *11 M. & W.*, 816 and 4, *Bing.*, 101. There would be no possibility even then of mistaking the Court, as there is no other Court in the province for any such purpose. But in this case the words are added, "Controverted Elections Act, 1874," and there not only is not, but there never has been, any other Court for the trial of controverted elections under that Act. This case is distinguished from the Kingston case, *39 U. C., Q. B. Rep.*, 139, very plainly by the difference in the heading. In that case the petition was headed simply "In the Election Court," and it was filed with the officer of the Election Court as constituted under the Act of 1873. In this case, first, the words were added in the heading, "Controverted Elections Act, 1874," which would have been an improper heading had the petition been intended to be filed in any proceedings under the Act of 1873, and plainly indicated that the court intended was the Supreme Court. Secondly; in that case there was in existence there a court constituted under the Act of 1873, called the Election Court. In this case there is no such court. That which was once the Election Court is defunct; not only was its business all completed—no doubt in the most satisfactory manner—but all its three Judges have been removed to more important and, it is to be hoped, not less congenial positions. If there be such a court here it is a court denuded of all its Judges. Thirdly; in that case the petition was filed in the court in which it

purported to be entitled, viz., "the Election Court," under the Act of 1873, which court had ordered it to be taken off the files. In this case the petition was filed in this court with the officer appointed by this court, which would, under the case cited, have been sufficient to obviate the defect in the heading had it been in this case, as in that, simply "In the Election Court." *Per* WILSON, J., (delivering the judgment of the Court), "If the petition had been delivered to the proper officer of the court to which it had belonged, or for which it was intended, the want of an intituling in the court, or a wrong intituling, would be an irregularity only, and, therefore, it would have been a curable and not a void proceeding. . . . . If there had been no such court in existence as the Election Court at the time, and the petition had been filed in the Queen's Bench, it would have been well filed, . . . and the wrong intituling of it, 'In the Election Court,' or in any other court, or the omission of intituling it at all, would have been only an irregularity." I do not need to go anything like the length of this decision, in which, however, I entirely concur, to sustain this petition as respects the heading.

The third objection is that the petition was not filed with the proper officer.

The Act, sec. 6, sub-sec. 3, requires that "presentation of a petition shall be made 'by delivering it at the office of the clerk of the court,'" and sec. 4 enacts that the "clerk of the court shall mean the clerk of the crown, chief clerk or prothonotary, or any other officer of the court prescribed for the purpose in question." As there is no clerk of the crown, chief clerk or prothonotary in this province,—that is, no one person holding either of these offices for the province, but only an officer for each county, had not an officer been prescribed for the purpose the petitions would probably have had to be presented to the clerks of the crown or prothonotaries for the several counties. The obvious inconvenience of such a practice induced the Court, before it proceeded to do any other business, to "prescribe" an officer for the purpose of receiving the petitions, one of which was presented immediately afterwards. The person elected was Martin I. Wilkins, the clerk of the crown and prothonotary of the Supreme

Court for the county of Halifax, and his appointment appears on the records of the Court in the following form:—

"Record of proceedings of the Supreme Court of Nova Scotia, as constituted a court for the trial of controverted elections, by the 37th Victoria, Chapter 10, entitled,—An Act to make better provision for the trial of Controverted Elections of Members of the House of Commons, and respecting matters connected therewith.

"FEBRUARY 13TH, 1875.

"The Court opened and organized. Present: The Chief Justice, Sir William Young; DesBarres, Wilkins, McCully, Justices.

"The Court appointed the prothonotary, Martin I. Wilkins, to be the clerk of the Court, under the provisions of the statute in that behalf, prescribed for that purpose."

After the opinion I have already expressed as to the nature and constitution of the Court, I need hardly say I consider this act of the Court completely within its power, and entirely valid and effectual, and the petition, in my opinion, was rightly filed with the officer so appointed.

The fourth and fifth of the objections relate to the service of petition, notice and copy of receipt on respondent. The petitioner attests, by his own affidavit, that he personally served these papers on the respondent in person. The statute requires them to be served "as in a civil suit," which meant, of course, by the sheriff. Why so plain and simple a requirement was neglected we are not informed. Of course it is a great irregularity, and fatal in itself to the petitioner's proceedings, unless it has been waived by some act of the respondent, such, perhaps, as this application. Although this Act does not favor formal and technical objections in the course of its proceedings, and has expressly provided against them, yet, on the other hand, we must remember that this is a highly penal statute. On referring to the petition I find that the respondent and his agents are charged with very grave offences, to which severe penalties are attached by the law, and however a Judge, in the course of his proceedings, when once entered upon, might discourage merely formal objections, as I think he is bound to do when once the parties

are before him, I do not think that that clause of the statute properly applies to the proceedings taken to bring the respondent into court; and unless he is legally brought into court I do not consider that he is bound to put in any appearance or take any step towards his defence, and that he may come in at any stage of the proceedings and have them set aside.

The cases cited by petitioner on this point apply to civil proceedings, and therefore, even if they were otherwise clearly in point, which I do not perceive to be the case, they are not applicable to a case like the present. They serve, however, to show that even in civil cases a defendant may come into court to set aside service, and even to set aside an appearance entered in his behalf, without waiving the defect of service. I cannot find that in any English case an application to set aside service was held to be a waiver of a defect or irregularity in the service.

But the petitioner has a still greater difficulty, if possible, in the fact that the respondent attests, on affidavit, that no copy of the deposit receipt was served upon him at all, pursuant to section 40 of the statute. This is contradicted by the petitioner's affidavit of service. This affidavit was not annexed to the petition on file, and had the respondent gone to the clerk's office he would have found there not only no sheriff's return on the petition, but no proof whatever of service of any deposit receipt, or of any other papers having been effected. Had there been, as there ought to have been, on file a return of the sheriff that the paper, including the deposit receipt, had been served, the burthen of denying the service would have been on him and he must have made a strong and clear case of denial of service of this paper in order to set aside the proceedings. His affidavit of denial would, if sufficient in itself, have been open to contradiction by petitioner, and, if contradicted, the conflict of affidavits must have resulted in favor of petitioner, and the service would have been upheld. Each party making these conflicting affidavits may be perfectly sincere and may believe himself to be stating the truth, and the respondent, finding no proof on file conflicting with his impression of the facts, had no reason to believe that it would be pretended that service of the deposit

receipt had been made. Under such circumstances it would be unreasonable to expect more from him than a bald statement that such service had not been made. He was not contradicting an affidavit, nor endeavouring to avoid the effect of a return, but simply making a statement which he had no reason to expect would be controverted. Were we to require from him greater particularity we ought, at least, to give him the opportunity of making an affidavit in reply. He has never had an opportunity of contradicting the petitioner's affidavit of service, which was not made until the 10th December, twenty-six days after the service, and twenty-two days after the rule *nisi* had been granted to set the process aside for want of service.

That the petitioner must satisfy the court that the writ was served, was the ground of the decision of ROUTHIER, J. in the Charlevoix case, recently decided on appeal to the Supreme Court. In that case the respondent in his preliminary objections denied service of the papers. At the hearing, no evidence on this point having been given by either party, the Judge decided that the petitioner was bound to satisfy the Court of the service, and not having done so, the petition was dismissed; which decision was upheld by the Court of Appeal. The petitioner in this case has failed to satisfy me that the copy of the deposit receipt was served, and on this ground also I consider that the petition ought to be dismissed.

At the argument, *Mr. Rigby*, for petitioner, asked the Court, in case the service should be held to be insufficient, to grant an extension of time for service under section 9 of the Act, which requires the paper to be served "within five days after the petition shall have been presented, or within such longer time as the Court or a Judge thereof may under special circumstances or difficulty in effecting service allow." This request has been duly considered. Passing by the question whether such an extension ought in any case to be permitted when not made until after the statutable period has elapsed, the application ought certainly to be made, at least, as soon as the respondent has failed in effecting the service in due time. In this instance four days elapsed before the stay of proceedings, after the expiration of the five days allowed by law, without the petitioner making an application for

enlargement of the time, and no application has since been made to discharge or suspend the stay of proceedings for that purpose. I do not think that any such special circumstances have been shewn in the course of this application. Had the petitioner handed his papers to a sheriff, doubtless they would have been served in time. The difficulty has arisen from his own laches in undertaking to serve them himself, and, in my opinion, the special circumstances referred to in the section do not include the laches of the petitioner himself. I think they refer to unforeseen difficulties and delays, which could not have been obviated by skill and care. The respondent has a right to insist upon the due observance of the requirements of the law by the party who seeks to unseat him. The very shortness of the time allowed for service by the Act, and the precision of language with which the extension of the time is guarded, indicate that it was not the intention of the Legislature that the clause should be loosely construed.

I cannot, therefore, think that an extension of the time ought to be granted in the circumstances under our consideration.

As to the costs, no less than eighteen grounds of objection are set out in the rule *nisi*, in nearly all of which the petitioner is sustained, and, as the two grounds on which he has failed come fairly under the head of new points of practice, I think that we cannot give the respondent the costs.

SIR WILLIAM YOUNG, C. J.—I think it advisable to add a few observations to the opinion that has just been delivered. The argument was conducted on much narrower grounds than we had anticipated. It was supposed that the 18th objection in the rule *nisi* of the 18th of November would be mainly insisted on, calling in question the right of the Dominion Parliament to create an Election Court, or to frame or authorize the Judges to frame rules and direct the practice of an Election Court in this Province. For my own part I could never bring my mind to entertain a doubt upon the subject. If the Dominion Parliament had no such power, it was a fatal defect in the constitution, of which the able lawyers who drew the British North America Act of 1867, and the British Legislature and Government, by whom every clause in it was

thoroughly considered and supervised, could scarcely have been guilty. A uniform system for the trial of controverted elections to the House of Commons was indispensable to its authority and the due exercise of its powers, and, to have depended on the Local Legislature on so vital a point would have been not only a strange anomaly, but would have involved in our opinion a practical absurdity. This Court, therefore, had no difficulty in 1875 in organizing itself as a Court, under the Act of 1874, and appointing its clerk, and, thereupon, in passing the rules now under my hand, and under which the Victoria case was tried by one of the Judges. Although this fundamental objection was mentioned on the recent argument, and urged with some show of earnestness, but little stress was laid upon it, and the petitioner's right to proceed was resisted mainly upon matters of form.

Under the 44th section of the Act of 1874, the Judges of the several Courts were empowered to make rules for its execution, and the regulation of the practice and procedure. The rules adopted by this Court are nearly identical with those of the Queen's Bench of Ontario, declaring *inter alia*, that no proceedings under the Act of 1874 shall be defeated by any formal objection. It is the adoption and the legitimate scope of this rule that raises in my mind the only difficulty in this case, and that upon a single point. I look upon the heading of the notice and petition, "In the Election Court," followed by a reference to the Act of 1874, as a very small objection, and if any, as completely cured by the above rule, though I admit that a heading "In the Supreme Court," would have been the more regular form; *re Kingston Election*, 39 U. C., Q. B., 144. The present case turns upon the 40th section of the Act, which seems to have been strangely overlooked. It requires the petition and notice, and a copy of the deposit receipt, (going further than section 9,) to be served as nearly as may be in the manner in which a writ of summons is served in civil matters. Now, it is shown that the petition was duly filed, and a copy thereof and notice served personally on the defendant, but not by a sheriff or bailiff. It is shown that the deposit of $1,000 was duly made, and a receipt therefor duly given by the clerk, and the petitioner swears that he served a copy of this receipt, which the defendant

denies. Had the service been made through an officer this discrepancy would not have arisen, and, clearly, the *onus probandi* lies on the petitioner. The substance of the Act has been fulfilled, but not the procedure. Is the defect, then, matter of form only, or is it something more? The Courts of Ontario and Quebec, although the same rule in both Courts discountenances formal objections, require a pretty strict observance of the conditions in the Act itself, and it must be conceded that the service in section 40 is one of the most essential. I think, therefore, that this objection must prevail, and the petition be set aside, but, for the reasons already announced, without costs.

Rule absolute without costs.

BRITTAIN *v.* PARKER ET AL.

PLAINTIFF brought an action of trover for logs cut and piled by him for his own use on land formerly belonging to John Lytell, who had died intestate, leaving three heirs, among whom were the plaintiff's wife and one of the defendants. A general verdict for the full value of the logs was found for the plaintiff, under the direction of the Judge.

Held, that the verdict must be set aside on the ground of misdirection so far as it affected the damages, as, even regarding the defendants as wrong-doers, the plaintiff was only entitled to one-third. JAMES, J., *dubitante*.

Q. Whether, the paintiff having admitted a tenancy in common with defendant, the latter could avail himself of that defence without a plea.

THIS was an action of trover for the alleged conversion of of thirty logs or sticks of timber, with counts in trespass for seizing and carrying away the same. The pleas denied the seizing and carrying away, and the conversion, and denied plaintiff's property in the logs. The cause was tried at Windsor before JAMES, J., and a general verdict found against both defendants, for the full value of the logs. A rule was taken out under the statute to set the verdict aside, on the following grounds; "1. That said verdict is against law and evidence. 2. For misdirection. 3. For the improper rejection of testimony. 4. For the improper reception of evidence. 5. Because, the plaintiff's witnesses having proved that he cut the timber in question upon land as to which he was tenant in common in right of his wife with the person through whom

the defendants claim, he could not recover damages in this action, there being no actual ouster. 6. Because the learned Judge misdirected the jury when he instructed them that no tenancy in common had been proved, although the plaintiff's witnesses had sworn to the fact without objection, and it had been so conceded when the motion for a nonsuit was made and during the whole course of the trial. 7. Because no joint conversion or trespass was proved as against the defendants. 8. Because no trespass or conversion was proved against defendants or either of them. 9. Because the learned Judge misdirected the jury when he instructed them as follows; *(a)* 'I think your verdict should be for the plaintiff.' *(b)* 'I think the plaintiff's property has been taken in a high-handed manner.' *(c)* 'I think the plaintiff's case comes before you without a stain.' *(d)* 'Mr. Parker might have been called to prove that he did not buy the logs.' And upon the grounds taken on the motion for a nonsuit." On the trial it appeared by the admission of the plaintiff that his wife and one of the defendants were joint heirs to the property on which the logs were cut, but there was no plea of tenancy in common or of justification under the tenant in common.

The rule was argued December 14th, 1878, before YOUNG, C. J., DESBARRES, MCDONALD and JAMES, J J.

Rigby, Q. C., in support of rule.—The plaintiff's witnesses having proved a tenancy in common of the land on which the logs were cut, he cannot maintain action without proving the destruction of the property. It is true there is no plea setting up this defence, but the evidence was given without objection. The plaintiff being tenant in common could, at most, only recover part of the value of the logs. Here the defendants took away the logs by the direction of one of the tenants in common. There is therefore no trespass proved against defendants.

Cites *4 B. & Ad.*, 614, to shew that the verdict cannot stand against both defendants here; also, *6 A. & E.*, 407.

The damages here are for the full value, while the plaintiff admits there were several parties interested. As to the sufficiency of the evidence of tenancy in common, cites *6 H. & N.*, 75; *7 M. & Gr.*, 342; *9 A. & E.*, 644. As to proper remedy of plaintiffs, *Waterman on Trespass*, p. 686, sec. 945; *Roscoe N. P. Ev.*, 968.

Foster, Q. C., contra.—There is not sufficient evidence of the tenancy in common. Plaintiff's statements are not sufficient to prove the title in others. (DESBARRES, J.—But can he go behind his own admission?) His proof of his own title is simply his statement. He was not obliged to prove title to sustain this action, but simply to prove a right to possession of the logs. (The COURT.—He is bound by his admissions.)

It is a general principle that the plaintiff must have notice by plea that the question of title is to be raised. The other side must cite cases to shew an exception.

Rigby, Q. C., cites *2 Levinz*, 113. I do not need a plea to raise the question as to the amount of damage.

Foster, Q. C.—There is abundant evidence of conversion against Francis Parker as well as against John Parker. Francis Parker's team was used to haul the logs. His son hauled them, and they were afterwards seen in his yard.

MCDONALD, J., now, (February 1st, 1879,) delivered the judgment of the Court:—

The declaration in this cause contains a count in trespass and one in trover for logs which were cut by the plaintiff on lands formerly the property of one John Lytell, who, it appears, died intestate and who was the plaintiff's father-in-law. The logs were afterwards brought to the mill of the defendant Francis Parker, for and under the authority of William Lytell, who is a son of old John Lytell and the plaintiff's brother-in-law. There was no documentary evidence of title at the trial on either side, but the plaintiff himself says that he claims under John Lytell and that William Lytell is a joint-heir with his (the plaintiff's) wife, who was a daughter of the intestate John Lytell; and William Lytell is proved to be the intestate's son. The plaintiff also says that there were only three joint-heirs and that William Lytell and he both cut when they liked, (meaning, of course, on the land referred to.) It is as clear as it can be, without documentary evidence, that William Lytell is tenant in common with his sister, the plaintiff's wife, of the land on which the logs were cut, and it is equally clear, by the evidence of David Lytell, that the logs, after having been cut on that land, were taken for and under the authority of William Lytell to Parker's

mill. William Lytell, as a tenant in common, had a right so to take the logs, so long as he committed no act which amounted to a destruction of the property, or to a destructoin of its nature or identity. The law was well laid down by MONTAGUE SMITH, J., in *Jacob* v. *Seward*, L. R., 4 C. P., 328, when he said, that it was perfectly clear that one tenant in common could not be treated as a wrong doer by another except for some act which amounted to an ouster of his co-tenant, or to a destruction of the common property. The tenant in common who is deprived by his co-tenant of the possession of the property held in common has a right to re-take it, if he can do so without force. *Waterman on Trespass*, 561.

In *Jacobs* v. *Seward*, already cited, a verdict was given for the full value of the crop for which the action was brought, and the Court did not enter it for one half, because it was held that the defendant, being a tenant in common, was no trespasser at all.

The learned Judge who tried this cause mentions in his report that William Lytel sold the logs to the defendants, but of that I find no evidence; and, assuming that he did sell, the purchaser would have the same right as the seller had and would be, himself, a tenant in common. There is very little evidence of any act of trespass or conversion by either of the defendants, even assuming that the logs were the exclusive property of the plaintiff, and none whatever of a joint conversion by both defendants. In *Wilson* v. *Barker & Mitchell*, 4 B. & Ad., 614, it was held that a person who knowingly received from another a chattel which the latter had wrongfully seized, and afterwards on demand refused to give it up to the owner, did not thereby become a joint trespasser, unless the chattel was seized for his use. The learned Judge charged the jury that there was no evidence of the tenancy in common of William Lytel with the plaintiff, but I think that was a mistake, because the same evidence which shows that the plaintiff has any interest whatever in the property establishes the fact of the tenancy in common. It is not simply evidence as such; it is the admission of the plaintiff himself under oath. It was objected that there is no plea of tenancy in common nor of justification under the tenant in common, (see *Mason* v. *Farnell*, 12 M. & W., 674,) and I con-

way by old Mr. Lytell, and his sons and daughters after him, for some thirty or more years, each one taking what he wanted without objection from the others. In pursuance of this long established usage, the plaintiff marked, cut and piled a small lot of logs which his brother-in-law seized and disposed of in some way to the defendant. I think I should have instructed the jury to find whether such a usage existed between the parties from which an agreement to use the land in that way could be inferred, and, if they were of that opinion, to find for the plaintiff for the full value of the logs as being the sole property of the plaintiff, and, because I did not so charge the jury, I think the verdict cannot be sustained. I think there is a good deal of evidence of usage in the case from which the existence of such a contract could have been properly inferred, and there are abundant cases to shew that contracts may be inferred from previous usage, *e. g.*, the liability to pay compound interest on current accounts when such a course of dealing had been established by usage between the parties. As the law now stands, its direct tendency is to promote quarrelling and litigation in families, and, if such be the case, it is a bad state of the law, which should be remedied either by legislative enactment or by judicial decisions.

The difficulty is enhanced by the absence of any remedy at common law; for the action of account for profits, as between tenants in common, does not in fact exist in this Province, there being no machinery for the purpose provided by our practice, and, if the machinery were provided, the principles governing the action are wholly unsuited to this Province, and parties must either go into equity to prevent petty acts of injustice, or settle their quarrels with the same implements used to fell their trees.

Even if either of the parties in this case were to apply for a partition of the lands, they would be met by this difficulty, that they have no title, and not even sufficient possession to protect the property against trespasses by anybody who chose to go and cut on the land. They hold the land only by casual acts of trespass, there being no evidence of the slightest act of possession which the law could regard as giving them a shadow of right. It is difficult to see how there could be a

partition of the land under such circumstances. The whole law on this subject is in a very unsatisfactory condition, and legislation is urgently required before serious results flow from such high-handed acts as those of the defendant, committed, as in this case, with impunity.

RYAN *v.* HAWES.

PLAINTIFF, an Inspector of Pickled Fish under cap. 49 of the Dominion Acts of 1874, brought an action to recover from the Deputy Inspector the cost of re-inspecting fish improperly branded by the Deputy, and the difference between the value of the fish as determined by the first inspection and the value as ascertained by the re-inspection, which amounts the Inspector had paid to the purchaser of the fish.

Held, affirming the decision of the County Court, that the Inspector's only remedy as to the difference in valuation was on the bond provided by the statute to be given by the Deputy Inspector, and that the cost of re-inspection, which the County Court Judge had held to be recoverable, being under $20, did not bring the case within the jurisdiction of the Court.

THIS action was brought in the County Court, by the plaintiff, the County Inspector of Pickled Fish, appointed under chapter 49 of the Acts of Canada for 1874, to recover from the defendant, who was a Deputy Inspector, appointed by plaintiff's predecessor, the cost of inspecting certain fish inspected by the Deputy and branded with his name, and, also, the difference in the valuation of the fish on re-inspection, which the plaintiff had paid to the vendee. The learned Judge of the County Court nonsuited the plaintiff, and from his decision an appeal was taken, the following questions of law being stated in the rule:—

1. Whether the decision appealed from is upon a ground raised by the pleadings.

2. Whether defendant's pleas raise any issue or defence upon which he is entitled to judgment upon the evidence.

3. Whether the Inspector, the plaintiff, being responsible for the official acts of his deputy, the defendant, as if done by himself, was not liable for all damages sustained in consequence of the neglect or malfeasance of the defendant, as his deputy, and, having paid the damages in question, was not entitled to recover them from defendant, upon the counts for money paid by the plaintiff to and for the defendant.

4. Whether the plaintiff was not legally liable and compellable to pay the damages in question for which the defendant was liable, and, would not a request or authority of the defendant be consequently implied and the plaintiff be entitled to recover back the money so paid, from the defendant, under the indebitatus counts for money paid.

5. Whether the evidence did not establish a cause of action under the second count of the declaration for which the plaintiff was entitled to judgment for the amount of the damages in question.

6. Assuming the remedy upon the defendant's bond was available to the plaintiff, whether he could not dispense with that security and proceed against the plaintiff individually, as in this action.

The argument of this appeal took place this term.

Rigby, Q. C., for appellant.—There was a nonsuit here on the ground that the amount found by the count to be due to the plaintiff was below the jurisdiction of the Court, unless the damages were taken into consideration.

McDONALD, J.—Should not even the money found to be recoverable, although less than $20, have prevented the nonsuit? It was recoverable in *case*, and was paid, not on account of the defendant, but in consequence of the misconduct of the defendant.

Rigby, Q. C.—The point at present is, whether the Inspector, having been obliged under the statute to pay to the purchaser of the fish the cost of re-inspection, could recover from his deputy the sum so paid, in an action of tort, as damage resulting from the deputy's negligence or on an implied assumpsit for money paid to his use. The Judge below found that the plaintiff was entitled to the sum paid for re-inspection, but, the amount being below the $20, he nonsuited him, which he should not have done if it is tort.

McCoy, Q. C., contra, contends that the appeal is not here properly, because it ought to have been a case reserved by the Judge.

The remedy pointed out for the plaintiff under the statute is on the bond. Cites section 6 of the act and the bond

given. *1 Addison on Torts*, 37, 38; *1 B. & Ad.*, 858, shew that where the statute imposes a duty and provides a remedy for its breach, that is the only remedy for private damage resulting from such breach. If there was no mode pointed out in the statute for the recovery, he might go for a tort; but here he has a remedy under the bond. The statute creates the duty; cap. 19 of '72 gives the bond.

The *11 Exch.*, 55, is a case where there there was a cumulative remedy by action and distress, because the statute gave both. *(Rigby, Q. C.*—That is repealed. *McCoy, Q. C.*—No.)

Where the purchaser buys on the representation of the vendor, *i. e.*, relying on warranty, his only remedy is against the vendor. He cannot go against the inspector.

If the plaintiff can have his remedy in tort, he has also on the bond, and a multiciplicity of actions ensues.

The deputy ceased to be a deputy when Tobin died, as he was appointed by him to hold office during pleasure. When there is a dispute about the inspector, the 11th section shows what is to be done. See also sections 17, 18; *2 Pugsley & Burbidge*, 157, on the question of jurisdiction.

Rigby, Q. C., in reply.—The pleadings do not permit the party here to say that there was only the one remedy. It should have been pleaded that there was a remedy given by the statute. The statute does not create the liability as between the principal and his deputy. The act makes the principal liable for the acts of his deputy, then the common law principle steps in and gives the principal a remedy against his agent. The cases cited in *Addison* refer to remedy by means of a particular Court, or by a particular method. Here the statute only gives a bond available to parties aggrieved. It does not give a remedy.

SMITH, J., now, (February 15th, 1879,) delivered the judgment of the Court:—

This is an appeal from a decision of the Judge of the County Court for District No. 1. The plaintiff is County Inspector of pickled fish, under cap. 49 of the Acts of the Dominion of Canada of 1874. The defendant was Deputy Inspector

appointed by the predecessor of plaintiff under the said act. The action is brought to recover from the defendant the cost of reinspecting certain fish inspected by him and branded with his name, and also the difference on the valuation of the fish reinspected and paid by the plaintiff to the vendee. A judgment of non-suit was given below, on the ground that there is no provision in the act which enables an inspector to recover from his deputy any money paid in consequence of a vicious or improper inspection made by him, or to render it obligatory upon the inspector to make good to the vendee any loss he has sustained in consequence of such inspection, but that his remedy is upon the bond required to be given by the deputy under the act. While entertaining this view, the learned Judge decided that under the 17th section of the act referred to, the plaintiff was entitled to recover for the "costs and charges for reinspection," overruling the objection taken by defendant's counsel on this point. I see no grounds for disturbing the decision, nor can I perceive any doubt, if the twenty-six dollars claimed for the difference of the value of the fish when reinspected is to be rejected, but that the fourteen dollars and twenty-five cents for which he might recover, was not within the jurisdiction of the Court below.

Whether the judgment appealed from can be sustained depends, as I apprehend, entirely upon the question of defendant's liability to reimburse in this action the plaintiff the $26 paid by him voluntarily to the vendor. After a careful perusal of the act and the authorities cited at the argument, I have come, most reluctantly, as did the learned Judge of the County Court, to the conclusion that if such a liability exists it can be enforced only by the remedy given by the statute, viz., an action on defendant's bond. It will be unnecessary for me to express an opinion as to the liability of the defendant which might be enforced in some other form of action, but I cannot avoid referring to section 11 of the act and suggesting the propriety of carefully pursuing its provisions, when practicable, in order to give the Deputy Inspector an opportunity of vindicating his brand and sustaining his character. In this case, however, the defendant has no grounds of complaint, for, upon the clearest testimony, and upon his own admission, a gross fraud was perpetrated upon the public in

connection with one of our most important and material branches of commerce.

But these considerations must not and cannot affect us in a court of law. The only question to be considered is, is he liable in this action. There is clearly no express liability created by the statute, and the obligation properly and faithfully to inspect the fish and brand the barrel is not a common law duty, but one of statutable imposition purely. The Legislature, having imposed the performance of certain official acts upon deputy inspectors, has been careful to provide a remedy for the non-performance or mal-performance of them, which seems to me to afford ample protection to anyone from injury or damage resulting therefrom. The 4th section of the act requires that "each inspector or deputy inspector shall, before acting as such, give security for the due performance of the duties of his office, in such sum as the governor may direct, by bond to Her Majesty, with two sureties," &c., and such bond "shall avail to the crown, *and to all persons aggrieved by any breach of the conditions thereof.*" The appointment of the defendant as deputy inspector and his acting as such being recognized by the plaintiff, I think it must be reasonably presumed such a bond was given and was available for plaintiff's purposes when this suit was brought. I regard the language of the section as not only providing but *prescribing* a remedy to parties aggrieved, which consequently brings the case within the application of a principle well recognized in English authorities. In the case of *Bishop of Rochester* v. *Bridges*, 1 B. & Ad., 859, LORD TENTERDEN said; "Where an act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other way." In the *Dundalk Western Railway Company* v. *Tapster*, 1 Q. B., 667, LORD DENMAN said; "The right and the remedy are both created by the Legislature, and the Company are bound to pursue the remedy provided by it." *Stevens* v. *Jeacocke*, 11 Q. B., 731, is to the same effect; also *The Vestry of the Parish of St. Pancras* v. *Batterbury*, 2 C. B., 571.

However troublesome or inconvenient it may be to obtain a copy of the bond, certified by the Secretary of State of Canada, in whose custody the instrument is provided by the

statute to remain, which copy is made *prima facie* evidence, I am not called upon to pass an opinion on the wisdom of the act; we have simply to carry out the law. I am, therefore, of opinion that if the plaintiff is entitled to recover the amount paid to the vendor on a valuation of the fish on re-inspection, he must resort to his statutable remedy on the bond of the defendant, and that the appeal must be dismissed with costs.

BERTRAM *v.* BONHAM.

DEFENDANT broke open the door of a barn without any circumstances of terror or violence, and in the *bona fide* assertion of an alleged right to the possession under a lease from plaintiff. Plaintiff was arrested under a warrant issued under cap. 105, R. S., of "Forcible Entry and Detainer."

Held, affirming the decision of the County Court, that the statute was not applicable to such a case.

THIS case arose under chapter 105, Revised Statutes, of Forcible Entry and Detainer. Defendant went into possession of property, consisting of a house and a barn under a lease from the plaintiff. There was a conflict between the parties as to whether the lease included the barn, and the defendant, in the assertion of his alleged right, broke into the barn "without any circumstances of terror or violence," and removed some of the plaintiff's goods, when he was arrested at the instance of the plaintiff under the statute. Plaintiff on the trial before the County Court Judge, District No. 1, proved his title under a deed, and defendant failed to produce the lease, but the Judge admitted parol evidence of the tenancy. The judgment below was for the defendant, on the ground that the statute did not apply to an entry made without violence and in the assertion of a legal right, and an appeal was taken from this decision and argued this term before SIR WILLIAM YOUNG, C. J., DESBARRES, MCDONALD, SMITH and WEATHERBE, J J.

Rigby, Q. C., for appellant.—Our title has been clearly proved. The defendant forcibly broke open the barn and had two men in possession removing the plaintiff's property. Defendant attempted to prove that he was a tenant, but he admitted that his tenancy was in a written lease, which he failed to produce. The Judge below said that the fact of a

tenancy could be proved by parol evidence, even where there was a written lease; but the extent of it cannot be proved in that way. He said further that the plaintiff did what he did under a claim of right. He must shew his right. If the defendant says there is a question of title involved, he must plead it and verify the plea by affidavit; Acts of 1874, page 25. The English act has a similar provision. Under that act the cases show that the claim must be *bona fide*. *6 C. B.*, 81; *5 D. & L.*, 648. A mere claim of right is not sufficient. *Fisher*, 2132, 2540. In *2 Chitty's General Statutes*, p. 154, will be found the English statutes and cases.

Motton, contra.—There is no appeal in this case. No appeal is provided for in matters of forcible entry and detainer. It is to the summary jurisdiction of the Court that the warrant is taken. R. S., p. 803, sec. 4 of cap. 105.

The instant the Judge admits that there is a question of title, he shows that he has no jurisdiction. The overholding act does not profess to try questions of title. The title does come in question here independently of the lease. The plaintiff admits the existence of a lease between himself and the defendant, and then is permitted to say that the barn is not in the lease.

Independently of the lease the defendant was in possession as tenant That fact can be shown by parol. *1 Taylor on Evidence*, 368; *4 B. & Ad.*, 311.

SIR WILLIAM YOUNG, C. J., now, (February 15th, 1879,) delivered the judgment of the Court:—

This is an appeal from the County Court, District No. 1. It turns upon the construction and meaning of the 2nd section of chapter 105, Revised Statutes, of forcible entry and detainer. The plaintiff is the owner of the Four Mile House on Bedford Basin, the property comprehending the tavern on the west, and the cottage and barn on the east side of the the road. Last spring he leased the property to the defendant, who went into possession and claimed the barn as included in the demise. On this point the evidence of the two parties is in conflict, and the defendant, having broken open the door of the barn and removed some goods of the plaintiff, was arrested in pursuance of the statute under a warrant. A com-

plaint was filed, and notice of defence put in, and the cause came on for trial. Mr. Naylor, as the agent of the plaintiff, prepared a lease which was executed by the parties, the original remaining in the hands of the plaintiff, and the defendant taking a copy in Mr. Naylor's office. One would have thought that the first thing to be exhibited at the trial would have been the lease, but neither the plaintiff nor his agent produced it, and the defendant, having served a notice to produce only a few minutes after ten, the plaintiff's counsel objected that it was too late, and successfully resisted the reception of a copy, so that the contents of the lease and the language of the description were not revealed, and the main question remained in doubt. That this should be so at the instance of the plaintiff, raises a presumption which it is impossible to avoid, that the lease would not have helped him. He says in his evidence that on the first of May he learned that the defendant had taken possession of the barn. "When I came there," he says, "I found that the barn closed by me was broken open; there were two oxen there; they were carrying my property out of the barn; I told them to desist, that the barn was not in the lease. The defendant told the men not to mind me, and to carry the things out as fast as they could. I then left them and came to town." The defendant, in his evidence, says that he supposed the barn to be included in his lease, that it was locked, and he gave eight days notice to the plaintiff to remove his things. Upon these facts the Judge was of opinion that the defendant did not come within the statute, and refused to grant a writ of possession, which the plaintiff insists he was entitled to.

The history and bearing of the act came before this Court in 1862, in the case of *The Queen* v. *Murdoch*, which I take from my own manuscript notes. It was argued by the present County Court Judge, which he has probably forgotten, but he advocated the same opinion which he holds now, and I looked thoroughly into it. The present chapter is founded upon the Provincial Acts of 1758 and 1779, (vol. I, 5 and 216,) the last introducing a remedy as between landlord and tenant, which is peculiar to our own Province. It was attempted to render it more stringent, by chapter 17 of the Acts of 1840, but this was repealed in the succeeding year at

the instance of the Home Government, the Crown officers, afterwards Lord CAMPBELL and Lord TRURO having denounced it in a letter to Lord John RUSSELL as arbitrary and oppressive. These glimpses of our past history in connection with names so eminent in the annals of our profession, cannot but interest us as lawyers. The operative words in section 3 of the present chapter; "wrongful and forcible entry into lands;" "wrongful detainer and withholding with force after possession demanded," are used in the Act of 1758, and in all the four series of our Revised Statutes. Wrongful and forcible entries upon lands, and holding them forcibly after complaint made, are the offences aimed at in the parent act, *8 Hen. VI.*, chap. 9. So also in the previous statutes; and the first point, says *Hawkins*, chap. 64, is what shall be esteemed an entry within these statutes. "It seems clear," says he, section 25, "that the entry ought to be accompanied with some circumstances of actual violence or terror; and therefore that an entry that has no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes." "A forcible entry or detainer is committed by violently taking or keeping possession of lands or tenements by means of force and arms, and without the authority of law." *4 Blackstone's Com.*, 248.

An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such kind of force as is calculated to prevent any resistance. Per Lord TENTERDEN in *Rex* v. *Smyth*, 5 C. & P., 203. In *Hawkins*, ch. 64, sec. 26, it is said that an entry may be said to be forcible in the manner of the entry, as by breaking open the doors of a house, whether any person be in or not, especially if it be a dwelling house, for which he cites, *8 Burr.*, 1732, where Judge WILMOT says; "The force employed ought to be such an actual force as implies a breach of the peace and makes an indictable affair."

Now, in this case, the defendant broke open the door of the barn without any circumstances of terror or violence, and in the *bona fide* assertion of a right which he claimed, and this statute was not designed for the trial of titles, but for the redress of unauthorized and violent wrong. I think, therefore, that the defendant was properly acquitted, and that the appeal should be dismissed with costs.

IN RE ESTATE OF R. H. BATH.

R. H. BATH died at Bridgetown, having appointed Joseph Wheelock his executor. His widow afterwards died, having appointed J. C. Troop and Fletcher Bath her executors and trustees to carry out certain directions contained in the will. The executors of Mrs. Bath, in April, 1875, cited the executors of R. H. Bath to appear in the Probate Court for the purpose of a final settlement of R. H. Bath's estate, when it appeared to the Judge of Probate that a settlement had been made by the executor of R. H. Bath, and concurred in by Troop as executor of Mrs. Bath, (see *2 Russell & Chesley*, 403,) and he decreed accordingly. On reference to a Master, further evidence was presented upon this point and the Master reported that such settlement had been concurred in by Troop.

Held, that this settlement concluded the co-executor and *cestuis que trustent* from opening up the estate thus settled, as at the time of the settlement Troop was acting as an executor, and not in his character of trustee, which had not yet attached.

THIS was a second hearing upon an appeal from a decree of the Judge of Probate for the County of Annapolis. (See *2 Russell & Chesley*, 403.) The first decision given in the cause remitted it to a Master, with the opinion that a certain memorandum relied upon by the respondents, the executors of R. H. Bath, as proof of a settlement with the executors of Mrs. R. H. Bath, did not appear sufficient to estop an investigation into the accounts of the two estates. The Master took further evidence in the cause and made a report. The cause was argued February 3rd, 1879, before SIR W. YOUNG, C. J., and MCDONALD and SMITH, J J., (DESBARRES J., being unwell, and JAMES and WEATHERBE, J J., having been concerned in the cause as counsel.)

Chesley, Q. C., in support of appeal.—Troop, who signed the memorandum in question as acting executor of Mrs. R. H. Bath, with Mr. Fletcher Bath, was but a co-trustee with him under the express terms of the will of Mrs. R. H. Bath. A *cestui que trust* is not to be prejudiced by an act of one of two co-trustees; *Parsons on Contracts*, 222; *2 Cr. & M.*, 384. The co-trustees cannot divest themselves of their character as co-trustees under the will. There are sums here that have been realized by the executors of Mrs. Bath since the proceedings in the Probate Court, from securities then outstanding.

MCDONALD, J.—We have nothing to do with that. You must go into the Probate Court for a further accounting as to that.

Chesley, Q. C., cites sections 55 and 66 of the *Probate Act*.

Foster, Q. C., (with whom was *Rigby, Q. C.*,) contra.—James Clarke died in 1846, leaving R. H. Bath his executor. Bath died in 1864, and his widow in 1865. The first settlement by Wheelock, R. H. Bath's executor, was in 1867. Wheelock's evidence shews that it was admitted by Troop both before and after the death of Mrs. Bath to be impossible to separate the estates of Bath and Clarke, and shews how this occurred; that Bath had taken securities for moneys of the Clark estate in his own name during eighteen years. That evidence is uncontradicted. (McDONALD, J.—R. H. Bath should have been held liable for what he had inventoried as Clark's estate, allowing him to show what losses had occurred.) (YOUNG, C. J., intimates that the Court has a very strong opinion that the Court here cannot send these accounts back to be re-opened.)

Foster, Q. C.—With regard to the settlement and Troop's right to make it, the written paper, which is the evidence of the settlement here, cannot be explained or contradicted by oral testimony. (YOUNG, C. J., reads clauses of Mrs. Bath's will to shew that her executors were made trustees simply and solely for certain specified purposes, to invest and manage certain funds for the benefit of certain specified legatees.)

The COURT intimate to Mr. Foster that he need not continue, and call upon Mr. Harrington to reply.

C. S. Harrington, in reply.—The minutes of the Probate Court shew that at the proceedings in the Probate Court at which the alleged settlement took place, J. C. Troop appeared under protest on the ground that the executors of Mrs. Bath had not been cited and that the estate of R. H. Bath could not be settled till the estate of Clark had been first settled. Following that, we have this significant fact that, after that protest, the proceedings appear to have stopped. No decree was made, and the reference to a decree then made in the paper relied on as evidence of a settlement here must be incorrect.

This very decree here appealed from recites Mr. Troop's protest against the proceedings before the Probate Court in December, 1872, and does not indicate any waiver of that protest on Mr. Troop's part. (McDONALD, J.—But is there not evidence of a settlement here outside the Court, and will

it not stand?) It is hardly possible to suppose that Mr. Troop agreed to a settlement after his protest in the Probate Court. (SMITH, J.—W. G. Foster shews that Troop expressed dissatisfaction as to his commissions, and that he said afterwards that Mr. Wheelock and he would arrange the matter.) But we are bound by the Judge's minutes as to what took place before the Court.

The paper here is, as Mr. Foster says, marked by a patent ambiguity. It is not only not explainable by oral testimony, but is not capable of any explanation at all.

(YOUNG, C. J.—Here is a memo. of securities to the extent of £604 17 1, handed over by Wheelock to Troop in 1872, as inventoried in R. H. Bath's estate, as part of settlement relied upon by the other side.)

Harrington cites *2 Perry on Trusts*, sec. 814, 416, 418. Troop was acting not only as executor but as trustee.

SMITH, J., now, (February 15th, 1879,) delivered the judgment of the Court:—

This is an appeal from the decree of the Judge of Probate for the county of Annapolis on the final settlement of the estate of Robert H. Bath, deceased. It appears that James Clark, of Bridgetown, died many years since, appointing the said Bath, with another, executors of his last will and testament. Bath's co-executor died, leaving the estate in his hands, which has not, so far as I can discover, been, as a separate estate, settled to this day, but has, since the death of said Bath, been commingled and strangely mixed up with the estate of Bath. Bath died, leaving his widow Eliza Ann Bath his sole legatee and appointed Joseph Wheelock his executor. A short time afterwards Eliza Ann Bath died, having made a will disposing of her estate and appointed Jared C. Troop and one Fletcher Bath her executors. Troop assumed the entire control of her estate with Bath's concurrence and then the *three* estates, as far as accounts were concerned, were treated *as one*, as Bath's and Clark's had been previously. Strange as this jumble may appear, it would seem to have been resorted to as a necessity, although I cannot help thinking that it would not have required a book-keeper of marvel-

lous acuteness to have kept separate accounts for each estate. According to the evidence given by Mr. Troop before the Judge of Probate, he pressed upon Mr. Wheelock the desirability of a settlement of R. H. Bath's estate and that a difficulty in the way of doing so was suggested by Mr. Wheelock, arising out of the fact of Clark's estate being still unsettled. Subsequently, however, steps were taken to meet Mr. Troop's desire, and, although it is denied by both him and his co-executor that any citations were served upon them, it is alleged by Wheelock that his final account was made out and handed to Troop for his approval, and that of the residuary legatees of James Clarke and of Mrs. Bath, in December, 1872. This is denied by Troop, but certain acts of his are strongly confirmatory of the correctness of Mr. Wheelock's statement. I can only imagine some misapprehension to have existed on this point. It is a significant fact that such an account was filed in the Court of Probate, and sworn to, as appears on the account before the Judge, by Mr. Wheelock, on the 18th day of December, 1872. On the back of this account is a memorandum in the handwriting of Mr. Troop, signed by the legatees under Clarke's will, as follows; "We, the undersigned, having examined the within accounts and finding them correct, agree to their final passing in the Probate Court." This bears date November 30th, 1872. Surely, then, there must have been some knowledge on Troop's part of the nature of this account and of the intention of Wheelock to have it passed by the Judge of Probate, some eighteen days before the period when he appeared before the Court, *i. e.*, on the 18th December, 1872, and made a settlement of the account, as contended for by Mr. Wheelock.

It is evident that no judicial act was done on that day by the Court, in the form of the ordinary decree on the settlement of estates, although, without doubt, Troop's mind must have been impressed that such was or was about to be made. His subsequent conduct can point to no other conclusion.

On the 14th day of April, 1875, the executor of the estate of Robert H. Bath was cited, at the instance of the executors of Eliza A. Bath, to appear in the Court of Probate at Annapolis for the purpose of a final settlement and accounting of the estate of the said Robert H. Bath, deceased. On the 30th

of April, 1875, and on subsequent days, the Court met, and, after hearing proctors for the respective parties and their witnesses, the Judge decreed, "that the several payments made by the said Joseph Wheelock, as the acting executor of Robert H. Bath, as shewn in his several accounts, although contrary to the notices and protests of Mr. Troop, the acting executor of the estate of the said Eliza Ann Bath were, by a memorandum, concurred in by the said Jared C. Troop, as the acting executor of the said Eliza Ann Bath, and that the settlement so had cannot be disturbed."

From this decree some of the legatees under the will of Eliza Ann Bath, have appealed, on several grounds, none of which, I think, can avail them, if the settlement contended for on the 18th December, 1872, was made by Mr. Troop and Mr. Wheelock as the acting executors of the respective estates.

This appeal was brought to a hearing before this Court, in May, 1877, when it was referred by an order to a Master to hear further evidence of the concurrence of the said Jared C. Troop in, and his approval of, the settlement referred to by the Judge of Probate, and of any payment made, and securities handed over to him in his lifetime by Joseph Wheelock. The Master, Lewis W. DesBarres, before whom witnesses were examined, has reported the evidence, and that the same is conclusive to shew the alleged settlement and the concurrence therein by the said Troop under his own signature.

I cannot read the evidence in any light that would enable me to come to a different conclusion. The testimony of Mr. Wheelock and of Mr. W. T. Foster, although contradicted by that of Troop, would, it seems to me, be exceedingly strong in favor of such a settlement. But, how are we to construe the acts of Mr. Troop as consistent with the position taken by him, that he had nothing to do with the account or the proceedings before the Probate Court on the 18th December, 1872, except as Proctor for the Clarks? As such Proctor he must have examined the account before he penned for his clients' signatures an assent to its passing and a certificate of its correctness. He could not but have been aware that it was the final account of the executor of Robert H. Bath, in connection with an estate of which he had pressed for a settlement, and in which the interests of those he represented

were so inseparably, as it is said, intermingled. But what does his memorandum of the 3rd of February, 1873, say? It was urged at the argument by Mr. Chesley, with a degree of zeal for his clients far, I may say, in excess of his apparent belief in the intelligence of the Court, that this memorandum was defective, and proved nothing to shew either a settlement or a concurrence therein by Mr. Troop. I think it shews both, and goes largely to confirm the testimony of Foster, who says; "I don't remember that Mr. Troop made any objection to the account, but something did not seem to suit him. It transpired from conversation at the Court, that Mr. Troop claimed a portion of the commissions from Mr. Wheelock. I think Mr. Wheelock said he was willing to do anything that was right. Mr. Troop observed that he and Mr. Wheelock would settle that matter between them afterwards." Settle what matter? Why, the commission to which the executor would in law be entitled in the settlement of Robert H. Bath's estate. Is it not also significant that about this time Wheelock passed over to Troop securities professedly representing the sum of £604 17s. 1d., as shewn by exhibit, and that the balance in Wheelock's hands of $243.35, at the time of the settlement, has been satisfactorily accounted for? With these facts before me, it is impossible to come to any other conclusion than the one arrived at by the Judge of Probate and the Master.

I have one other question to consider, and I shall do so briefly. Such a settlement having been made by the executor of the estate of Robert H. Bath, who is also a trustee with Fletcher Bath, under the will, does it conclude the *cestui que trust* from subsequently resisting a decree based upon such settlement, and opening up an estate thus in good faith settled? The period when the respective and independent duties of executor and trustee attach seemed to be strangely confused at the argument. There can be no question but that one executor can receive payments irrespective of his co-executor and his receipts will be sufficient. Each has an independent right over the personal property of his testator; *2 Atk.*, 695; *1 Perry on Trusts*, sec. 421. At the time of settlement neither the position nor duties of executors had passed from Troop and Bath, and their character and responsibilities as

trustees in reference to the assets of the estate had not attached. There had been no severance of any portion of the estate, or any appropriation of it to the particular purposes of the trust indicated by the will. *Hill on Trustees*, 369.

I am of opinion that the appeal must be dismissed with costs.

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Plaintiff hired defendant to travel and sell certain goods for him for cash or approved notes, to return such goods as were not disposed of and account for the proceeds of those sold. Defendant having failed to account, this action was brought, the declaration containing a count in trover and a count for money had and received. Defendant having been shewn plaintiff's account for the goods, by his attorney, admitted it to be in the main correct, and offered to pay $100, (being less than the plaintiff claimed,) which was refused, and on plaintiff's attorney asking defendant if he would neither account for the goods, nor give them up, nor pay for them, defendant said he would do neither. *Held*, that this answer was no evidence of a wrongful conversion, there being no evidence that the defendant, when he made it, had any of the goods in his possession, as he had previously stated to plaintiff that he had sold them all.

The plaintiff stated in his evidence that defendant had promised to come to his place and settle, and that he, (plaintiff), understood from the defendant on that occasion that all the goods were sold except a few bridles. This evidence was not contradicted by the defendant. *Held*, that it was not sufficient to warrant the conclusion that the goods were sold for cash, as the defendant was authorized to sell either for cash or approved notes and that the plaintiff could not recover on the count for money had and received.

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Held, that, (the appeal being under the Act of 1877,) the Court could not review the decision of the County Court Judge on the weight of evidence as to defendant's occupancy, (although it might, had there been no evidence, have said that a non-suit should have been ordered,) and that the judgment for plaintiff for $70 must be upheld.

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from the order discharging the assignee having expired, the assignee was beyond the summary jurisdiction of the Court.

Held, that, apart from any legislative act conferring it, the Judge had power to re-open the order for the discharge of the assignee for the purpose of reducing his charge; that, in addition, the Judge had the power under section 28, sub-sec. *b* of the Insolvent Act of 1875; that the assignee was not entitled to commission on the $7,400, and that the judgment on the order *nisi* must be reversed.

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The assignee in his final account charged commission on $7,400, the gross proceeds of real estate sold under foreclosure, the whole of which, with the exception of $14 surplus, was paid over by the sheriff to the attorney of the mortgagee.

Held, that the assignee was not entitled to commission on the $7,400.

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Plaintiff, who at the time was visiting surgeon of the City Hospital, performed a surgical operation upon the deceased, of whose estate defendant was administratrix. Dr. McFatridge had been attending deceased in his illness, with Dr. Parker as consulting physician. The latter advised the deceased to have the operation performed in the hospital, telling him that plaintiff, as house surgeon for the time, would perform the operation, and he, Parker, would assist. Deceased assented to the operation being performed by plaintiff, and it was performed successfully.

Held, that, although the hospital was primarily an eleemosynary institution, yet as there was no by-law prohibiting the house surgeon from charging for services rendered to patients able to pay, and who resorted to the institution for the sake of better attendance, &c., plaintiff could recover on an implied assumpsit.

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Fraser and Paint, having terminated their partnership business, referred all their disputes of every description to the award of two arbitrators and such umpire as they should select before entering upon their duties as arbitrators. Authority was given to the arbitrators or any two of them to enlarge the time for making the award, and the two originally appointed extended the time, and, after doing so, selected an umpire and entered upon the inquiry. Desiring to obtain all the information possible, the arbitrators, without the request of either party, called before them certain persons, neither of the parties being present, but it appeared that the persons so called had no evidence to give about

the matter in controversy, and no objection was taken by the party moving to set aside the award, who knew that the arbitrators had called such persons before them, but yet continued to attend and conduct the reference on his own behalf. The partnership was indebted to Fraser in the sum of $52,840, and there was due to it by Paint $2,624, and the award directed that the assets should be held and managed by Fraser under the inspection of the umpire, and that the sale of the partnership property should be made by him at such times and places as the umpire should approve. The award was made 28th September, 1875, and no motion was made to set it aside until March, 1876, the objecting party having in the meantime, with knowledge of the facts upon which he based his objections, proceeded with the arbitration, attended the sale of the property, and, at the request of the auctioneer, furnished information as to the boundaries of the land.

Held, that the application to set aside the award was too late, not having been made within one month, as required by the statute, nor within the time allowed for moving for a new trial, as would be necessary had the submission not been made a rule of Court; that the conduct of the arbitrators, although in one respect indiscreet, was on the whole unexceptionable, and that the conclusions of the arbitrators were legal and within their authority.

Held further, that under section 22 of cap. 109, R. S., the Judge in Equity was warranted in ordering that in case Paint should refuse to execute a deed required to effectuate a sale directed by the arbitrators to be made, the same should be made by a master of the Court.

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BAILMENT.

A watch was left by one Von Schoern with the plaintiff for repairs, and when called for two days afterwards was not ready, whereupon plaintiff loaned to Von Schoern a watch to be kept till the repairs were completed. The watch so loaned becoming out of repair in Von Schoern's hands, was taken by him to defendant for repair, and defendant loaned Von Schoern another to use in the meantime, with which Von Schoern absconded. Plaintiff, learning that his watch was at defendant's shop, demanded it, and defendant refused it, setting up a lien for repairs.

Held, affirming the decision of the County Court, that the loan of plaintiff's watch to Von Schoern was a mere gratuitous bailment, existing during the mere pleasure of the lender, passing no special property to Von Schoern, and that defendant could not set up any lien for the repairs.

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Parties proceeded against under the provisions of section 655 of the City Laws for infringement of the regulations relating to buildings are entitled to an information, as in the case of *City of Halifax* v. *McLearn*, 1 Oldright, 689, if they require it, when, if the Court declares the structure to be a nuisance, the Council may order its removal, and it is not necessary to resort in the first instance to the Police Court, under section 654.

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1. The act of incorporation of the town of New Glasgow, in sec. 46, provided that the Corporation should assess, collect and pay over whatever moneys were required for poor rates, and all other except school rates, and should have within the town all the powers relating thereto vested in the Sessions, Grand Jury, and Town Meetings, &c. The 52nd section

empowered the Town Council to make bye-laws and rules touching all matters within their authority, including rules for regulating the mode of assessment and levying the same, which bye-laws when approved by the Governor in Council should have the force of law. The bye-laws so made defined personal property for the purposes of assessment, so as to comprehend all goods and chattels, and provided for the trial of appeals from the assessment. They contained a further provision that the roll when finally passed should be valid, and bind all parties concerned, notwithstanding any defect or error committed in or in regard to it. The Bank of Nova Scotia doing business at New Glasgow through a branch, appealed from its assessment, and the appeal having been heard in the mode provided by the bye-laws, the assessment was confirmed, and a warrant issued, in pursuance of which a levy was made on books of account of the Bank, and on a number of promissory notes the property of the Bank. The Bank having thereupon brought the assessment and warrant up by certiorari;

Held, that sec. 67 of cap. 21, R. S., did not apply to the case, being confined *ex nomine* to proceedings of the Sessions, that the levy on promissory notes was good, that the provision of the bye-laws making the assessment final and binding, notwithstanding defects or errors, did not prevent the Court from reviewing it under writ of certiorari, and that the certiorari would lie in such a case if the affidavit disclosed sufficient grounds, the scope of the writ being wider here than in England.

The Court, after ruling as above, quashed the certiorari, without costs, sufficient grounds not having been shown for setting aside the assessment.

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2. No certiorari should issue in a civil suit without an affidavit showing sufficient grounds therefor in the estimation of the Court or Judge who grants it, and which may be controverted on other affidavits and motion to set the certiorari aside. The affidavits for the writ should not be entitled in the cause. The affidavits after the cause is brought up must be so entitled. The writ of certiorari has a wider scope in this country than in England, and is often issued after judgment and for small sums, but should not be issued when the statutable right of appeal has not been lost or defeated. It is not so restricted in this country as not to remove any other than judicial acts. Sufficient bail must be given to respond the judgment to be finally given in the cause, and if the Commissioner has any doubt as to the sufficiency of the bail, he should require them to justify.—The concluding clause of section 24, chapter 75, R. S., (3rd Sra.,) does not take away the jurisdiction of this Court. *Barnaby et al.* v. *Gardiner et al.*, James' Reports, 306, affirmed.

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Held, that the prisoner should have been proceeded against only on the count for receiving, and that, although he might be guilty of both offences, as the robbery was committed in another County than the one in which the prisoner was tried, he must be discharged.

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CONSTRUCTION OF AGREEMENT.

Defendant held a mortgage of certain property in the possession of the mortgagor, and agreed, by letter prepared by the plaintiff, although signed by the defendant, to sell to the plaintiff all the interest and title of defendant to said premises, with all securities, collateral or otherwise, held by said defendant in respect of said mortgage; also, a certain policy of insurance, &c., &c., the defendant guaranteeing good title, and that said mortgage was the first incumbrance, &c. Afterwards, plaintiff having given the defendant his check for $500, on account, the defendant signed a receipt substantially in these terms; "Received from T. K. Jenkins, the sum of $500, on account of the purchase of all my interest and title in the mortgage on Stephen property. * * I have sold said mortgage of $8000, together with the securities, collateral or otherwise held by me, * * * and half the interest of the adjoining property south, and insurance policy and receipts on said property, and all other securities, * * * balance to be paid as soon as possession is obtained by T K. Jenkins." The Court, having under a rule power to draw inferences as a jury might do, held that the possession referred to in this agreement was possession of the securities mentioned, and not of the land, and they non-suited the plaintiff in an action of damages against defendant for not performing his agreement by delivering possession of the land.

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Plaintiff obtained in the County Court an order, under R. S, cap. 94, sec. 44, for constructive service of a writ of summons on the defendant, who was absent at the time in England. The affidavit on which the order was taken was substantially in these terms; "That said defendant is absent from the Province, and is, as I am informed and believe, in Great Britain, so that personal service cannot be effected upon him, if at all, without great expense and inconvenience; that I have a good and available cause of action against defendant; that H. P. is the agent and partner of the defendant in this Province."

Held, reversing the decision of the County Court, that the affidavit was not sufficient, but that it should have set out the facts and circumstances necessary to make it "appear to the satisfaction of the Judge," exercising his own judgment in the matter, that the case came within the terms of the statute providing for constructive service.

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Plaintiff had been in the employ of the defendant Company under Gould, their Chief Engineer, at the rate of $5 a day, for the time he was actually engaged. On the 6th October, 1874, Tremayne, the London Secretary of the Company, wrote to Harrison, then Manager in Nova Scotia, in these terms; "It has been agreed that Gray shall receive pay from the Company as from the day of Mr. Gould's departure from the works, at $5 per day, the term of his permanent services to be fixed by the Board, when the salaries of other officers are discussed." This letter was shewn to plaintiff by a subordinate servant of the Company, but without the consent of Harrison, who swore that the whole matter had been left in his hands to deal with by the Board of Management in London. Harrison repudiated the terms contained in the letter of Tremayne, and between the 6th October, 1874, and the 4th January, 1875, by himself, and through Dudgeon, the Treasurer, wrote to plaintiff, informing him that he was to be paid only for the time that he was actually employed.

The jury found for plaintiff, allowing $5 per day for every day from August 3rd, 1874, to April 30th, 1875.

Held, by YOUNG, C. J., (with whom SMITH, J., concurred,) that the letter of Tremayne, not having been intended to be seen by plaintiff, did not constitute a contract with him, or if it did that it had been formally repudiated afterwards, and that the verdict must be set aside; by WILKINS, J., (with whom McDONALD, J., concurred,) that the plaintiff having seen the letter of Tremayne without any fraud on his part, and having adopted and acted upon it, was entitled to the amount awarded by the jury.

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1. Testator's will was attacked by the Trustees of the Methodist Church, Guysborough, (to whom the testator had left the bulk of his estate by a previous will,) on the ground that undue and improper influences had been used. The Judge of Probate decided that such influences had not

been made out with sufficient clearness to avoid the will, and directed the costs of all parties to be paid out of the estate. The decree as to costs having been appealed from, the Court held that the Judge of Probate had no power to decree the payment of costs out of the estate, and could only award them to be paid by the party against whom his decision was made, but that this Court, on review, could direct what costs should be allowed, and from what fund. The parties were accordingly directed to pay their own costs up to the time of the decree, and the appeal was sustained, with costs to be paid by the Trustees.

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2. Upon proof of Testator's will in solemn form the Judge of Probate decreed that it had been duly executed, and he made the costs payable out of the estate. On appeal, the Court held that the will had been shown to have been duly executed; and that the due execution had been proved of a codicil which operated as a republication of the will. The appeal was therefore dismissed, but without costs.

WEATHERBE, J., dissenting as to the question of costs, considered that the appeal should be dismissed with costs.

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——— OF APPLICATION FOR DISCHARGE OF INSOLVENT, where the discharge was refused on appeal, ordered to be paid out of the estate.

In re Hutchinson, Insolvent..... 40

——— ON DISCONTINUANCE BY PLAINTIFF IN REPLEVIN.

See REPLEVIN.

——— ON ESTREATING RECOGNIZANCE.

See PRACTICE; estreating recognizance.

——— REFUSED ON DISCHARGE OF RULE NISI.

The petition was set aside without costs, as petitioner had succeeded on nearly all of the eighteen grounds taken against him in the rule *nisi*, and the two grounds on which he had failed came fairly under the head of new points of practice.

Woodworth v. *Borden*..... 571

——— RULE TO QUASH CERTIORARI MADE ABSOLUTE WITHOUT.

See judgment In re Assessment of Bank of N. S...... 32

See also INSOLVENT ACT OF 1869—1, 2.

See also PRACTICE; opening judgment.

COUNTY COURT, APPEAL FROM.

See APPEAL.

——————— JURISDICTION OF.

See JURISDICTION.

COURT. EQUAL DIVISION OF.

See EQUAL DIVISION OF COURT.

CRIMINAL JURISDICTION of Stipendiary Magistrate of City of Halifax.

See CERTIORARI—3.

DARTMOUTH, Liability of for County School Rate.

The Act incorporating the town of Dartmouth provided that the Town Council should have jurisdiction over the support and regulation of the public schools, regulating the assessments, collecting the assessments, and that they should vote, assess, collect, receive, appropriate and pay whatever moneys were required for County assessment, poor, school and other rates and assessments, and should have within the town all the powers relating thereto vested in the Sessions, Grand Jury, School Meeting and Town Meeting. By another section it was enacted that, after the passing of the Act, the town should be set off into a separate school section, and should have the expenditure of all rates raised within its limits for the schools of the town, as also of all Government and School Grants for such schools, which grants should be paid to the town.

Held, that notwithstanding these enactments, the Town Council was bound to assess and pay over to the County Treasurer its rateable proportions of the assessment of thirty cents per head, provided for by R. S., cap. 32, sec. 52.

In re Dartmouth School Assessment..... 147

DEED, EXECUTION BY MASTER.

See EXECUTION OF DEED, &c.

DEMAND AND REFUSAL to sustain Count for Conversion.

See TROVER—1 and 2.

DEMURRER.

See PLEADINGS.

DEPUTY INSPECTOR, action against by Inspector for costs of re-inspection, &c.

Plaintiff, an Inspector of Pickled Fish under cap. 49 of the Dominion Acts of 1874, brought an action to recover from the Deputy Inspector the cost of re-inspecting fish improperly branded by the Deputy, and the difference between the value of the fish as determined by the first inspection and the value as ascertained by the re-inspection, which amounts the Inspector had paid to the purchaser of the fish.

Held, affirming the decision of the County Court, that the Inspector's only remedy as to the difference in valuation was on the bond provided by the statute to be given by the Deputy Inspector, and that the cost of re-inspection, which the County Court Judge had held to be recoverable, being under $20, did not bring the case within the jurisdiction of the Court.

Ryan v. *Hawes*..... 595

DESCRIPTION IN MORTGAGE.

See ESTOPPEL—3.

DIRECTORS OF BANK, QUORUM OF.

See QUORUM.

DISCHARGE OF ASSIGNEE, re-opening order for.

See ASSIGNEE, re-opening order for discharge of.

——————— OF INSOLVENT.

See INSOLVENT ACT OF 1869—2.

DISCRETION OF JUDGE.

See PRACTICE—Continuance.

DISTRIBUTION OF POWERS.

See LEGISLATIVE AUTHORITY.

DOWER.

The deceased husband of plaintiff occupied land under an agreement to purchase, which was not shown to have ripened into a title, and was not signed or shown to have been ratified or acted upon by the parties having the legal title to the land. Plaintiff brought action for dower against the defendant, who held possession, which was not shown to have been wrongful, but failed to identify the land of which her husband had had possession, as the lot described in the writ.

Verdict for defendant sustained.

Kieley v. *Thompson*..... 86

DYKED AND MARSH LANDS.

The Wickwire dyke, being constructed outside of and affording valuable protection to the Grand Pré dyke, previously constructed, an appraisement was made under the statutes then in force, identical in terms with R. S., 4th Series, c. 40, s. 27, by which the proprietors of the Grand Pre dyke were required to pay to those of the Wickwire dyke £19 annually. This sum so settled was annually paid by the proprietors of the Grand Pré marsh so long as that marsh received any protection from the outer dyke. In 1869 a heavy gale and unusually high tide broke the outer dyke and submerged the Wickwire marsh, and the dyke was not fully repaired until 1871, when the proprietors called a meeting of the proprietors of the whole level, had freeholders appointed as before, and obtained from them an award of $200, to be paid annually by the proprietors of the Grand Pré dyke.

Held, that the statute could not be a second time invoked, and that the proprietors of the Grand Pré dyke could not be called upon to contribute anything beyond the sum of £19, originally settled.

Defendants having contended that they could not be required to contribute at all, as their dyke was not protected in whole by the Wickwire dyke, *Held*, that having acquiesced in the annual payments from 1848 downwards, and set out in their answer that they had offered and were willing to pay the amount after 1871, when the repairs were completed, it was too late for them now to raise such a question.

Held by McDonald, J., though the decision did not proceed upon that ground, that defendants were at liberty to insist, as a good defence, upon the fact that the necessary notices of meetings for the appointment of appraisers, &c., had not been legally given to *all* the proprietors of the inner dyke.

Wickwire et al. v. *Gould et al*..... 469

EJECTMENT.

See Estoppel—3.

——————— PLAINTIFFS IN.

See Practice; ejectment.

"ELECTION COURT," HEADING "IN THE."

See Election Petition.

——————— Petition.

A petition against the return of the respondent, headed "in the Election Court; Controverted Elections Act, 1874," &c., was filed in the office of Martin I. Wilkins, as Clerk of the Court, and served upon the respondent by the petitioner. The rules adopted by the Court prescribed that the petition should be filed with the clerk of the Election Court, and the act, by section 40, required the petition and notice, "with a copy of the deposit receipt to be served as nearly as may be in the manner in which a writ of summons is served in civil matters." Respondent denied that any copy of the deposit receipt had been served upon him and was contradicted by the petitioner's affidavit. Mr. Wilkins' appointment was made by a record substantially in these terms, "Record of the proceedings of the Supreme Court of Nova Scotia as constituted a court for the trial of controverted elections by 37th Vict., c. 10, entitled, &c. The Court opened and organized; present, &c. The Court appointed the Prothonotary, Martin I. Wilkins, to be clerk of the Court under the provisions of the statute in that behalf."

Held, that the act,—the Controverted Elections Act of 1874,—was not *ultra vires*, that, although the petition would have been more properly headed in the Supreme Court, the heading "in the Election Court," followed by the words, "the Controverted Elections Act, 1874," was unobjectionable, (or, *per* Sir Wm. Young, if objectionable, the objection was completely cured by the rule of the Court discountenancing merely formal objections,) that the petition had been filed with the proper officer and could not, as respondent contended, have been properly filed with the clerk of the Election Court organized under the statute of 1873, as that Court was defunct; that the service of the petition was bad, as it should have been made by the Sheriff, and that the burden of proof of the service of the deposit receipt rested upon petitioner, and had not been made out to the satisfaction of the Court; that these defects were not remedied by the rule as to merely formal objections, and had not been waived by the respondent; and that no circumstances had been shown to justify the enlargement of the time for service, even assuming that the Court had the power to enlarge it after the expiration of the time for service limited by the rules.

The petition was set aside without costs, as petitioner had succeeded on nearly all of the eighteen grounds taken against him in the rule *nisi*, and the two grounds on which he had failed came fairly under the head of new points of practice.

Woodworth v. *Borden*..... 571

EMBEZZLEMENT.

The prisoner, not having been in the employ of the prosecutor, was sent by him to one Milner with a horse as to which Milner and the prosecutor, who owned the horse, had had some negotiations, with an order to Milner to give the bearer a cheque if the horse suited. On account of a difference as to the price, the horse was not taken, and the prisoner brought him back. Afterwards, the prisoner, without any authority from the owner, took the horse to Milner and sold it as his own property, or professing to have the right to dispose of it, and received the money, giving a receipt in his own name.

Held, that a conviction for embezzlement could not be sustained, as the prisoner, when he received the money, did not receive it as a servant or clerk, but sold the horse as his own, and received the money to his own use.

The Queen v. *Topple*..... 566

EQUAL DIVISION OF COURT.

On an equal division of the Court, the modern practice seems to be that the party who has obtained a verdict, as a general rule, retains it, that the Court has a discretionary power to order a new trial or reargument where neither party prevails, and that on appeal from inferior tribunals the decision below is affirmed.

Gray v. *Steel Company of Canada*..... 506

EQUITABLE DEFENCE.

See PLEADINGS; plea.

——————— REPLICATION.

See ESTOPPEL—1.

See also PLEADINGS; replication.

EQUITY APPEAL, heard in vacation, Order and Quorum for.

Under R. S., cap. 95, sec. 78, an order for the hearing of an appeal from the decision of the Judge in Equity in vacation need not be given by the Court *in banco*, but may be signed by the Judges individually, and the appeal may be heard by the same quorum that would be required for the regular term of the Court.

Windsor & Annapolis R. Co. v. *Western Counties R. Co*..... 376

EQUITY JUDGE disqualified by professional connection with suit.

Ritchie, E. J., when at the Bar, had been professionally consulted in reference to the suit which was afterwards instituted by bill in equity, and on that account had at first declined to act in the matter, but had afterwards, to facilitate matters, undertaken to sign any merely *pro forma* orders in the cause, and had, with this understanding, signed an order to appoint an examiner to take evidence On appeal from this order, *Held*, that under R. S., cap. 95, s. 6, which went farther than the English rule, the Judge was disqualified, and the order must be set aside.

Harris v. *Wallace*..... 326

ESTOPPEL.

1. Plaintiff brought action for the non-delivery of certain goods. Defendant pleaded among other pleas that plaintiff was estopped by a judgment in a former suit brought by the present defendant against the now plaintiff for the price of the goods, to which action it was pleaded that the goods had not been delivered, which issue was found against the present plaintiff. Replication, among others, on equitable grounds, in effect that the judgment pleaded had been recovered without plaintiff having had an opportunity, owing to unforeseen circumstances, of substantiating his plea by testimony. The identity of the issues raised in the two suits was clearly established, and, a verdict having been found for plaintiff, *Held* that the doctrine of estoppel applied, that the equitable replication, not setting out the circumstances referred to, was insufficient, and that the verdict must be set aside.

Marmaud v. *McCready*..... 66

2. Plaintiff brought action against the defendant, a Sheriff, for the seizure and sale of a horse on an execution against one Nicholson, who had some time before the seizure been the real owner, although when taken the animal was in the possession of the plaintiff, who claimed it under an alleged purchase. Defendant's attorney testified that before seizure plaintiff had told him the horse belonged to Nicholson, and that on the faith of that statement the Sheriff had been induced to seize. Before the sale, however, plaintiff notified the Sheriff that the horse was his.

Held, reversing the decision of the County Court, (at Annapolis,) that the plantiff was not estopped by his representation and the defendant's having incurred expenses in feeding the horse, &c., in consequence thereof, from setting up the truth as to the ownership of the horse.

McKay v. *Bonnett*..... 137

3. Defendant, desiring to borrow money on mortgage, took the plaintiff, who was the solicitor of the mortgagee, upon the land offered as security, and pointed out the boundaries of the land. Plaintiff drew up a mortgage in which the land was described as that on which defendants resided, but the boundaries given were shown by parol evidence not to include the portion on which they resided, although it was clearly the intention of all parties that this portion should be included in the mortgage. Plaintiff having taken an assignment of the mortgage, foreclosed it, and bought in the property at the Sheriff's sale, the description in the Sheriff's deed following that in the mortgage. Plaintiff then brought action of ejectment, and defendants, as to this portion, pleaded that plaintiff had no title.

Held by JAMES, J., that defendants were not estopped from saying that the land in question was not included in the mortgage, but that the verdict for plaintiff must be sustained, as it was the clear intention to include the portion on which defendants resided, and the ambiguity had been cleared up by parol evidence; by YOUNG, C. J., DESBARRES, and SMITH, J. J., that the defendant was estopped by his representation that the whole of the land, including the part in question, was to be comprised in the mortgage.

Fullerton v. *Ibbitson et al*..... 225

4. Action was brought against defendant as transferee of shares in the plaintiff Bank, for calls. There was no valid transfer of the shares under the Act, but defendant had paid calls, given a receipt for a dividend, combined with others in appointing a proxy, and, being present at the trial and hearing all this evidence, had not produced any evidence or offered his own testimony in reply.

Held, that he must be treated as a shareholder.

Bank of Liverpool v. *Bigelow*..... 236

ESTREATING RECOGNIZANCE.

See PRACTICE.

EVIDENCE, IMPROPERLY ADMITTED.

See SLANDER.

——— WEIGHT OF, &c.

See APPEALS FROM COUNTY COURT—2, 3, 4.

EXECUTION, goods of third party taken under.

See SHERIFF; trover against.
See also ESTOPPEL—2.
See also REPLEVIN—3.

——— INSTRUCTIONS ENDORSED ON.

See PRACTICE; Bail.

——— OF DEED BY MASTER UNDER ORDER OF COURT.

Held further that under Section 22 of Cap. 109, R. S., the Judge in Equity was warranted in ordering that in case Paint should refuse to execute a deed required to effectuate a sale directed by the arbitrators to be made, the same should be made by a master of the Court.

In re Fraser & Paint..... 10

EXECUTOR, SETTLEMENT BY, binds co-executor and *cestuis que trustent.*

R. H. Bath died at Bridgetown, having appointed Joseph Wheelock his executor. His widow afterwards died, having appointed J. C. Troop and Fletcher Bath her executors and trustees to carry out certain directions contained in the will. The executors of Mrs. Bath, in April, 1875, cited the executors of R. H. Bath to appear in the Probate Court for the purpose of a final settlement of R. H. Bath's estate, when it appeared to the Judge of Probate that a settlement had been made by the executor of R. H. Bath, and concurred in by Troop as executor of Mrs. Bath, and he decreed accordingly. On reference to a Master, further evidence was presented upon this point and the Master reported that such settlement had been concurred in by Troop.

Held, that this settlement concluded the co-executor and *cestuis que trustent* from opening up the estate thus settled, as, at the time of the settlement, Troop was acting as an executor, and not in his character of trustee, which had not yet attached.

In re Estate of R. H. Bath..... 604

EXECUTORS, ACCOUNT AGAINST ONE OF TWO.

The Court threw out a strong opinion that defendants could not set up as a defence that they had agreed to advance certain goods to the deceased executor in his lifetime, which were to be credited and received by him as such executor in payment of the moneys to become due on the bond; but that point was not formally decided.

Bath, Executor, v. *Dennison et al*..... 303

FORCIBLE ENTRY AND DETAINER.

Defendant broke open the door of a barn without any circumstances of terror or violence, and in the *bona fide* assertion of an alleged right to the possession under a lease from plaintiff. Defendant was arrested under a warrant issued under cap. 105, R. S., of "Forcible Entry and Detainer."

Held, affirming the decision of the County Court, that the statute was not applicable to such a case.

Bertram v. *Bonham*..... 600

FRAUD, EVIDENCE OF, in action on Promissory Note.

See PROMISSORY NOTE.

FRAUDS, STATUTE OF.

Defendant, previous to the 1st April, 1876, engaged with plaintiff by parol, as clerk, at a fixed rate *per annum*, with a share of profits on a separate branch of the business. On February 14th, 1877, defendant asked for and obtained a fortnight's leave of absence, when an accounting was gone into, and plaintiff gave defendant his promissory note, (which he afterwards paid,) for the balance of his salary up to the end of the year, April 1st, 1877. Defendant did not return, and plaintiff brought action for non-fulfilment of his contract of service and for money had and received.

Held, that, although the plaintiff could not recover on the count for non-fulfilment of defendant's contract, as that was not to be performed within a year, he could recover on the money count, as the defendant had received payment for services to be performed within a few weeks, (from the time of giving the note,) and which services defendant did not render.

Wier v. *Letson*..... 299

FRAUDULENT OVERVALUATION.

See INSURANCE, FIRE—2, 4.

FRAUDULENT PREFERENCE.

See INSOLVENT ACT OF 1869—2, 3.

GARNISHEE ORDER.

See TEACHER'S SALARY.

GROUNDS OF APPEAL.

See PRACTICE; grounds of appeal.

HALIFAX, Convictions by Stipendiary Magistrate of City of.

See CERTIORARI—3.

——— ———, SEWERS IN THE CITY OF.

See SEWERS—1, 2.

HOSPITAL, CITY.

Held that, although the hospital was primarily an eleemosynary institution, yet, as there was no by-law prohibiting the house surgeon from charging for services rendered to patients able to pay, and who resorted to the institution for the sake of better attendance, &c., plaintiff could recover on an implied assumpsit.

Farrell v. *McLaren*..... 75

IMPLIED CONTRACT.

See ASSUMPSIT.

INJUNCTION.

See MINES AND MINERALS

INSOLVENT ACT OF 1869.

1. Section 34 of the Insolvent Act of 1869, providing that the inspectors shall superintend and direct the assignee in the performance of his duty under the Act, &c., does not render the inspectors liable for the wrongful act of the assignee, in the absence of evidence showing that they authorized the act complained of. Costs directed to be paid out of the estate.

Durkee v. *Cox et al*..... 17

2. The Insolvent, having entirely disregarded the provisions of the Insolvent Act as to keeping proper books of account, had no means of knowing his actual financial condition, and, being refused accommodation by parties from whom he had been accustomed to receive it, gave them preferential security for their existing and future advances, the result of which was that the goods purchased from other creditors, and not paid for, were levied on for the exclusive benefit of the creditors so preferred.

The Judge of Insolvency having granted a discharge, suspending its operation for one year, his decision was appealed from and reversed.

Costs directed to be paid out of the estate.

In re Hutchinson, Insolvent 40

3. Plaintiff, as assignee under the Insolvent Act of 1869, brought an action of trover against defendant for certain goods transferred by the insolvent thirty-nine days before the assignment, the transfer being attacked in this suit as void under section 89 of the Act. Plaintiff, on the trial, put in evidence a bill of sale made by the insolvent about two months previously to the assignment, for the purpose of proving contemplation of insolvency on the part of the insolvent at the time of making the transfer in question. The circumstances connected with the said bill of sale were explained so satisfactorily to the mind of the Judge, that he withdrew the consideration of it from the jury.

Held, on a rule *nisi* for a new trial, that it should have been left to the jury to say what effect should be given to it.

Forrest, Assignee v. *Almon et al*..... 110

4. The plaintiff, as assignee, proceeded by bill in equity to procure the cancellation of a conveyance made by the insolvent, charging that the conveyance had been made contrary to the provisions of the Insolvent Act of 1869, with intent to give an unjust preference to certain creditors, and fraudulently to impede, obstruct or delay the creditors in their remedies, and with the knowledge of the grantees, or reasonable cause on their part to know and believe that the grantor was unable to meet his engagements. The jury found that at the time of making the conveyance the grantor was in embarrassed circumstances and unable to meet his engagements; but they found that the grantees did not know and had not reasonable cause to know or believe that such inability existed, and they negatived any intent fraudulently to impede, obstruct or delay the creditors.

Held, affirming the judgment of the Equity Court, that, the jury having found as they had, on ample evidence, the conveyance could not be set aside under section 88 of the Act of 1869, and that plaintiff could not attack it under section 89, as having been made in contemplation of insolvency, as that was not charged in the bill.

Forrest, Assignee, v. *Muir et al*..... 457

INSOLVENT ACT OF 1875.

1. Plaintiff, on the 16th August, 1875, issued a writ of attachment against defendant, an absconding debtor, the affidavit of debt describing him as a trader. Defendant's goods were attached August 30th and, pursuant to a Judge's order, made September 4th, were sold September 15th, and the money was paid into Court on October 7th to respond the plaintiff's judgment, after which, on the 19th of October, proceedings were taken under the Insolvent Act of 1875, to put defendant's estate in compulsory liquidation, and the estate passed into the hands of the assignee. Plaintiff claiming a lien under his attachment; *Held*, that the assignee was entitled to the money paid into Court.
Rumsey v. *Hare*..... 4

2. Where the Judge of the County Court for District No. 2, Lunenburg, &c., passed two orders, one postponing a meeting of creditors called to consider an offer of composition and ordering the assignee to retain the estate until discharge applied for, and the other ordering a meeting to be held at Halifax, the Court, holding that the Judge could not order such meeting out of his own jurisdiction, set aside both orders, as both had a common object, and directed the costs of the appeal to be paid out of the estate.
In re Sutherland..... 89

3. A claim less than six years old at the date of a writ of attachment is not barred by the statute of limitations because the six years expire before the declaration of a dividend.
In re Leake & Laidlaw, Insolvents..... 484

See also AFFIDAVIT FOR ATTACHMENT UNDER INSOLVENT ACT, &c.
See also ASSIGNEE, RE-OPENING ORDER, &c.

INSOLVENT ACTS OF 1869 AND 1875.

At a meeting of creditors of W. W. Rickards, an insolvent, under the Insolvent Act of 1869, held in May, 1873, objections were filed to the claim of Joseph S. Rickards, and duly served, about two years after which Joseph S. Rickards himself became insolvent. His assignee in 1878, Joseph S. Rickards having died in the meantime, obtained a rule granting him permission to file answers to the objections within fifteen days, contestant to have a like time to reply.

Held that, although under the Act of 1875, the Judge of the Insolvent Court had the discretion to grant an enlargement of the time for filing answers, and could make such an order even after expiration of the three days prescribed by statute, in the present case in which the application was not made until more than four years after the time when it should have been made to the assignee under the Act of 1869, the order could not be upheld.
In re Estate of Rickards..... 493

INSPECTION OF FISH.

See DEPUTY INSPECTOR.

INSPECTOR OF INSOLVENT ESTATE, liability of.

See INSOLVENT ACT OF 1869—1.

INSURANCE, FIRE.

1. Plaintiff brought his action on a policy of insurance containing a condition requiring, in the event of loss, a certificate from the two magistrates most contiguous to the place of the fire. No such certificate was produced, and plaintiff relied on a waiver of the condition, the evidence of which consisted of the fact that when plaintiff's attorney handed to

defendant's agent a letter forwarding a certificate from two other magistrates and explaining why a certificate from the two nearest had not been produced, the agent said nothing. Defendants also pleaded a condition as to vacancy of the premises and change in the possession.

As to the first point, the Court held that the silence of the defendant's agent, who had on other occasions expressly insisted on a compliance with all the conditions of the policy, was no evidence of waiver, and, the evidence as to change of possession and vacancy being clear, they set aside the verdict taken by consent for plaintiff.

O'Connor v. *Commercial Union Insurance Company*..... 119

2. Plaintiff obtained a policy of insurance from the defendants, containing a condition that if the interest of the assured was other than the entire unconditional and sole ownership, it must be so expressed in the written part of the policy, otherwise the policy to be void. There was a mortgage to secure the sum of $900 on a portion of the insured property, no mention of which was made in the policy, but the policy had been effected on the verbal application of one of the plaintiffs, who testified that he had told defendant's agent that there was a mortgage of $500 on the property, (referring apparently to another mortgage, an assignment of which was held by two of the plaintiffs, the equity of redemption being in the plaintiff McLeod and another who was not a plaintiff.) The building was valued in the claim at $2,000, and four of plaintiffs' witnesses testified that it was worth that amount, a fifth, that it was worth only $500, while the ten witnesses for defendants valued it at sums ranging from $300 to $500. The verdict was for plaintiffs for the whole amount of their claim, not allowing $149 for the proceeds of property saved.

Held, that as there was undisputed evidence of an incumbrance not mentioned in the policy, and no evidence of fraudulent omission on the part of the Company, and further, as the claim had been wilfully exaggerated, and the verdict was excessive in that no allowance had been made for salvage, it must be set aside.

McLeod et al. v. *Citizens' Insurance Company*..... 156

3. The policy of insurance issued by defendants to plaintiff required, among other things, as a condition precedent to recovery under the policy, a certificate under the hand of a Magistrate or Notary Public most contiguous to the place of the fire. The fire took place at Sable River, a country district several miles in length and breadth, and the evidence for plaintiff was merely to the effect that the certifying Justice resided at Sable River.

Held that, even in the absence of countervailing testimony, as the plaintiff had notice by the pleadings and the motion for non-suit that proof of compliance with this condition would be required, the evidence was not sufficient to sustain the finding of the jury for plaintiff.

Herkins v. *Provincial Insurance Company*..... 176

4. Plaintiffs brought action on a policy of insurance, and the jury, in answer to a question whether the claim had been honestly made, replied; "being over-estimated but not with intention of fraud." Butcher, a co-plaintiff, gave very strong evidence to implicate Longley, first as being privy to the destruction of the property, and, secondly, as having made a false and fraudulent claim. The whole evidence, in the opinion of the Court, showed badges of fraud, and, although the jury had negatived intentional fraud in the statement of the claim, their verdict was for only $400, while the claim had been made for $565.06.

Held, that the verdict must be set aside.

Longley v. *Northern Insurance Company*..... 516

MARINE.

1. Defendants issued a policy of insurance containing a condition that the plaintiff was not to use the ports of Big Glace Bay, Schooner Pond, Block-house Mines, or Bridgeport, C. B., except during June, July and

August. The loss occurred in October, at a place known as 'the Port of Caledonia,' on the same coast, and about three-quarters of a mile from the workings of Big Glace Bay. The 'port of Big Glace Bay' had, at the date of application, and of the issuing of the policy, ceased to exist as a port for vessels, and the port of Caledonia, which was within the limits of the Bay, had been substituted therefor.

Held that the loss was within the risk excepted, and that the policy might reasonably be construed as if the word "in" were substituted for the word "of."

Campbell v. *Canada Insurance Union*..... 21

2. Plaintiffs' written application for marine insurance, made October 17th, 1870, to the St. Lawrence Marine Association, of which defendant was broker, and in which he was a shareholder, contained the following statement; "Insurance elsewhere not to exceed $2,000." The application was accepted October 25th, 1870, and a policy delivered to the plaintiffs' agent, containing no prohibition against insurance elsewhere. The vessel was insured in other companies to the amount of $4,000.

Held, that the statement in the application or slip was a positive representation of a future fact material to the risk, and that, being false it avoided the policy.

McDonald et al. v. *Doull*..... 276

INTEREST ON MONEY deposited with Prothonotary.

Prothonotary ordered on motion to account for bank interest on money paid to him under 37 Vic., c. 13, s. 2, for land appropriated to Dominion purposes under the Act; but allowed ten per cent. on the bank interest as compensation.

In re Bunker's Island..... 367

JOINDER.

Joinder of the Trustees of Amherst Court House Grounds, added under an amendment obtained at the trial, held mere surplusage.

Trustees of Public Property v. *Kerr*..... 317

JOINT AND SEVERAL Promissory Note, declaration on.

See PLEADINGS; Declaration.

JUDGMENT.

See MERGER.

——— OPENING.

See ASSIGNEE, re-opening order, &c.
See also PRACTICE; opening judgment

——— PROOF OF by Sheriff taking goods of third party under execution.

See SHERIFF, TROVER AGAINST.

——— SET ASIDE.

There was a variance between plaintiff's and defendant's statements as to the consideration for which the confession was given, plaintiff having deposed that it was for the indebtedness to him of defendant's brothers who had become insolvent, and that he had agreed to credit them with further supplies of goods upon being sufficiently secured. Defendant deposed that the security was given wholly for future

advances of goods and obligations to be incurred by plaintiff on account of the insolvent and that plaintiff had wholly refused to carry out his part of the contract. Plaintiff, when confronted with the facts as deposed to by defendant, admitted that defendant's statements were true, but contended that the judgment was not sufficient for the purposes for which it had been given, and said that he held it as a security for the past indebtedness of the insolvent, (for which he had accepted a compromise). The judgment was set aside.
O'Mullin v. *McDonald* 201

See also PRACTICE; notice of trial.

JURISDICTION OF COUNTY COURTS.

Defendants entered into a bond to the plaintiff and his co-executor, to secure a debt of $810, payable by instalments, the first of which, amounting to $161:40, was over-due; but the condition of the bond referred to a mortgage given contemporaneously with it, which contained a covenant that on default made in the payment of any instalment, the whole sum unpaid should immediately become due and payable. Action was brought in the County Court for the amount of the instalment.

Held, that the judgment of the Court, which was for plaintiff, could not be sustained for want of jurisdiction, the debt being indivisible for $810, and recoverable only in the Supreme Court.
Bath, Executor, v. *Dennison et al* 303

——————— OF COUNTY COURT JUDGES IN INSOLVENCY.

See INSOLVENT ACT OF 1875—2.

JUSTICE disqualified by relationship to complainant.

Conviction for cruelty to animals quashed, one of the Justices being the father of the complainant.
In re D. Barry Holman 375

LEGISLATIVE AUTHORITY.

The power of legislation as to the Windsor Branch, *i. e.*, the line of railway between Windsor and Windsor Junction, belongs exclusively to the Legislature of Nova Scotia, under the 92nd section of the B. N. A. Act, sub-sec. 10, that road being a Local Work, and not coming within any of the classes excepted by the section referred to; and therefore the Act of the Dominion Parliament, 1874, cap. 16, is *ultra vires*; (JAMES J., dissenting as to this point.)
Windsor & Annapolis R. Company v. *Western Counties R. Company* 376

LICENSES TO SEARCH AND WORK.

See MINES AND MINERALS.

LIEN UNDER ATTACHMENT.

See INSOLVENT ACT OF 1875—1.

LIMITATIONS, STATUTE OF.

1. Defendant made a note of hand to S., which was endorsed to plaintiff, who received payments on account of it from time to time from the endorser. Defendant made no payments, but, after six years from the date of the note, made a new note to plaintiff for the balance due on the original note, the stamp on which, bearing date identical with the date of the note, was for the single duty, and was affixed by plaintiff on the day subsequent to the delivery of the note to him.

Held, that the stamping was insufficient, and that the note could not be received on the trial as an acknowledgment to take the case out of the statute of limitations, that the payments by the endorser did not enure to prevent the operation of the statute as against the maker, and that the mere striking of a balance as between the parties did not constitute an account stated to take the case out of the statute.

McFatridge v. *Hunter*..... 289

2. A claim less than six years old at the date of a writ of attachment is not barred by the statute of limitations because the six years expire before the declaration of a dividend.

In re Leake & Laidlaw, Insolvents..... 484

See also POSSESSION OF TRUSTEES.

MAGISTRATE, CERTIFICATE FROM NEAREST.

See INSURANCE, FIRE—1, 3.

MAILING OF NOTICES.

See NOTICES; mailing of.

MASTER OF COURT, Execution of Deed by.

See EXECUTION OF DEED, &c.

MEDICAL SERVICES.

See ASSUMPSIT.

MERGER.

Judgment was taken for plaintiff in January, 1874, on a promissory note of defendants to one Steadman, endorsed to plaintiff, who issued an execution, and afterwards assigned the judgment to Steadman, by whom a second execution was issued. Defendants sought to have this execution set aside, on the ground that the judgment had been taken in violation of a settlement with Steadman, who had agreed to accept, and had received a mortgage in full payment. The evidence was conflicting, and the Court, holding that there was no foundation for the doctrine of merger, discharged the rule *nisi*, with costs.

McDonald v. *Mitchell et al*..... 274

MINES AND MINERALS.

Five licenses to search for minerals other than gold were granted to the relators, all over the same area, according to the practice adopted by the Mines office, under sections 86 and 91 of cap. 9, R. S., the first to expire 21st May, 1874, and the others at intervals of about one, two, three and four years respectively thereafter, the licenses having been all granted on or about the same date. On the 28th of May, 1877, two days after the expiration of the relators' fourth license to search, defendants, having a license to search over an area overlying in part the area covered by relators' license to search, applied for and obtained a license to work one square mile, partially overlying and including within its boundaries the area under license to search to the relators. The latter applied for an injunction to restrain the defendant from interfering, which was refused by the Equity Court on the ground that over the area first above referred to, which contained only four and a quarter square miles, not more than four valid licenses to search could be granted, that the relators' fifth license to search, expiring May 27th, 1878, was invalid, and that on the 28th May, 1877, there was no obstacle to the defendants obtaining their license to work.

On appeal from this decision the Court held that the practice of the office was wrong in granting more than one license to search, with right of renewal, to the same party over the same area, that on this ground the license to search relied on by relators was invalid, and that, without respect to defendants' title, the injunction must be refused, but without costs, as both parties had acted under an erroneous view of the law.
Attorney-General v. *Fraser* 351

MISDIRECTION.

See INSOLVENT ACT OF 1869—3.

MONEY PAID.

Defendant, by letter dated at Sydney, C. B., asked the plaintiff to send him a specified quantity of liquor *in bond*, which plaintiff accordingly did, executing a bond in the usual way under the Customs Act of 1867, conditioned to deliver the goods without alteration or diminution at the Port of Sydney, within ninety days. The goods were shipped under a bill of lading by which the master undertook to deliver them at the Port of Sydney Bar, which although in the same harbor, is a different port from that of Sydney. The goods were never entered, and plaintiffs were obliged, under their bond, to pay the duties.

Held, that the request of the defendant in his letter was to be understood as a request that plaintiff should enter into the bond; that plaintiff could recover on a count for money paid, without proof of any subsequent request, and that it was no objection that the bill of lading made the goods deliverable at Sydney Bar, as the defendant could have paid the duties at Sydney and had them landed at the Bar.
Foster et al. v. *Lamie* 269

See also FRAUDS, STATUTE OF.

———— ON PROMISSORY NOTES WITH FORGED ENDORSEMENTS.

See PARTNERSHIP—1.

MONEY RECEIVED action for, where goods sold by Agent, under authority to sell for cash or approved notes.

The plaintiff stated in his evidence that defendant had promised to come to his place and settle, and that he, (plaintiff), understood from the defendant on that occasion that all the goods were sold except a few bridles. This evidence was not contradicted by the defendant. *Held*, that it was not sufficient to warrant the conclusion that the goods were sold for cash, as the defendant was authorized to sell either for cash or approved notes and that the plaintiff could not recover on the count for money had and received.
Walker v. *Cunningham* 1

MORTGAGE, erroneous description in.

See ESTOPPEL—3.

NEGLIGENCE.

Defendant hired to plaintiff for two dollars a wharf at Whycocomagh, for the purpose of shipping cattle. The wharf was in bad repair; two of the stringers were objectionable, one of them being rotten, which, however, could not be seen until it was broken. Plaintiff drove over the wharf eighteen or twenty cattle, a much larger number than had usually been driven over it, and defendant said he would not, if present, have allowed such a number to go over at once. The cattle becoming

frightened on the wharf ran back to the shore, and in doing so broke the imperfect span of the wharf. The case having been properly left to the jury, they found that the injury was not occasioned through any insufficiency in the wharf, but by the negligence of the plaintiff in using the wharf as he did, and they found for defendant.

Rule refused, SMITH and JAMES, J J., dissenting.

McDougall v. *McDonald*..... 219

NON-JOINDER.

See PLEADINGS; declaration.
See also PRACTICE; ejectment.

NON-SUIT, directed upon motion to set verdict aside.

See REPLEVIN—2.

NOTARY, CERTIFICATE FROM.

See INSURANCE, FIRE—3.

NOTICE OF TRIAL.

See PRACTICE; notice of trial.

NOTICES, MAILING OF.

By a resolution providing for calls on bank stock, the mailing of a circular to each shareholder was made an essential part of the notice. The Cashier swore that circulars had been prepared printed in part, and that it was the duty of the junior clerk to fill them up and mail them. The clerk swore that he had filled them up and mailed them, but on cross-examination said he had not read the print, and did not know what it was about. Defendant did not deny that he had received a circular. The Court having power to draw inferences of fact as a jury, found that notices had been mailed in sufficient time, as required by the Act.

Bank of Liverpool v. *Bigelow*..... 236

NUISANCE, falsely representing building to be.

See PLEADINGS; declaration and plea.

OCCUPANCY, EVIDENCE OF.

See Judgment in York v. *McLaughlin*..... 185

OPENING JUDGMENT.

See ASSIGNEE; re-opening, &c.
See also PRACTICE; opening judgment.

ORAL AGREEMENT not admitted to vary Promissory Note.

See PROMISSORY NOTE.

ORDER IN COUNCIL.

The allegations contained in an Order in Council may be questioned in a suit, and without making the Crown or Government a party to the suit.

Windsor & Annapolis R. Company v. *Western Counties R. Company*.... 376

OVER-VALUATION.

See INSURANCE, FIRE—2, 4.

PAROL CONTRACT.

See FRAUDS, STATUTE OF.

PARTIES.

See PRACTICE; parties.

PARTITION OF LAND, Jurisdiction of Probate Court in.

See PROBATE COURT, JURISDICTION, &c.

PARTNERSHIP.

1. Graham, the active member of the insolvent firm, made a number of promissory notes in the firm name in favour of one Thomas Fraser, by whom the notes purported to be endorsed, but the endorsements were all of them forged. The notes were presented to the claimants and negotiated by Graham, who received the money on them, and a large part of the proceeds was appropriated to partnership purposes.

Held, that, although the Bank could not claim on the notes, it could rank for the amount of them as money paid.

In the matter of Graham & McKay, Insolvents, &c..... 251

2. To a declaration by plaintiff for the price of one-half interest in a horse alleged to have been sold by plaintiff to defendant, plaintiff retaining the other half interest, defendant pleaded among other pleas a set-off for the keep and care of the horse, and expenses connected with taking the horse to and from Truro, while the joint ownership lasted. The Judge of the County Court ruled that defendant could not offset his account, as that would be offsetting a partnership matter, depending upon an adjustment of accounts between the parties, plaintiff's claim being for property brought into the partnership.

Held, that the rejection of the set-off was wrong, and that the judgment below must be reversed.

McDonald v. *Power*..... 340

PAYMENTS.

See LIMITATIONS, STATUTE OF—1.

PAYMENT INTO COURT, Replication to plea of.

See APPEAL—1.

PLEADINGS.

DECLARATION.

Action was brought on a joint and several promissory note made by four promisors, one of whom was dead. The action was brought against the three survivors, the declaration setting out the note as made by the three defendants, naming them, "together with one John Nass," the deceased promisor, but it did not add that he was dead, or show any reason why he had not been made a defendant. A verdict was taken for plaintiff by consent, and a rule to set it aside.

Held, that the objection was one that should have been taken by plea in abatement, and could not be made a ground of objection to the verdict for plaintiff.

McKeen v. *Nass*..... 256

See also MONEY PAID.

DECLARATION AND PLEA.

Plaintiff's first count set out that he was possessed of a messuage known as Emerald Hall, which he had been accustomed to let for hire to soldiers of the garrison, to be used as a dance hall, and that defendants, well knowing the premises, and contriving to injure plaintiff, unlawfully and unjustly persuaded, procured and induced the General commanding the forces by an order to prevent the soldiers from assembling in said Hall. The second count differed only in alleging that the Hall was occupied in a legitimate, orderly and proper manner, and that defendant, knowing and contriving, (as before,) wrongfully and falsely represented to the General that it was a nuisance, by means of which false representations the General was induced to prohibit the use of said Hall by the soldiers. Defendant pleaded that plaintiff at the time mentioned occupied said premises, and, contrary to law, kept a disorderly house, frequented by soldiers and citizens, who, by their riotous and disorderly conduct, disturbed the peace of the citizens, and that the General, in consequence of the disorderly house so kept by the plaintiff, placed the said Hall out of bounds for the military, &c.

Held, on demurrer, that the plea was bad, as it neither traversed nor confessed and avoided plaintiff's allegation, the gist of which was that the city, contriving to injure the plaintiff, wrongfully, unlawfully, and falsely represented, &c., but that the declaration did not disclose a good cause of action, as, although the city could be held liable for intentional acts of misfeasance, it did not appear that there was any binding agreement between plaintiff and the lessees of his building conferring rights or interests upon him which had been violated by the procurement of the defendant.

Lawson v. *The City of Halifax*..... 169

PLEA.

To a declaration on a bond to Her Majesty, conditioned for the performance by one of the defendants of the duties of Collector of Rates, and the immediate payment over to the County Treasurer of such rates whenever the sum received amounted to $100, defendants pleaded on equitable grounds, that while the said collector was travelling on the Queen's highway with the sum of $336 lawfully in his possession for the purpose of paying it over to the County Treasurer, he was, without any fault or want of diligence, forcibly and feloniously robbed of said sum.

Held, on demurrer, that the plea was good.

The Queen v. *Cameron et al*..... 68

REPLICATION.

Where the defendant pleads a plea on equitable grounds, the replication thereto need not allege that it is on equitable grounds, as no replication on any other grounds can be pleaded.

Barton et al. v. *Baldwin*..... 302

See also APPEALS FROM COUNTY COURT—1; PRACTICE; replevin, *and* PRACTICE; pleading.

See also ESTOPPEL—1.

PORT excepted under Marine Insurance Policy.

See INSURANCE, MARINE—1.

POSSESSION OF TRUSTEES appointed by Act, held possession of *cestuis que trustent*.

In August, 1788, W. Freeman, in consideration of a building to be erected for a court house and jail, at Amherst, conveyed certain land to a number of Justices of the Peace for the County, named in the deed, and their associates, *habendum* to them and their successors in trust for

the County of Cumberland forever. The Act of 1848, c. 28, after reciting the execution of this deed, the erection of the court house and jail, and the death of all the trustees named in the deed, enacted that the Grand Jury and Sessions should appoint trustees, to be a body corporate by the name of "the Trustees of the Amherst Court House grounds," in whom was to vest the legal estate in the land in question, provided, among other things, that the act should not interfere with the management and control thereof being vested in the Sheriff for the time being. This Act continued for six years, but before its expiration, the first edition of the Revised Statutes was published, which, by cap. 97, provided for the appointment of "Trustees of Public Property" in each county, and vested in such trustees "all lands granted, reserved, or dedicated, or which had for twenty years before the passing of said chapter been used for public purposes in the county." The statute contained a clause declaring that the provisions of that chapter "should not affect any land or buildings then vested in trustees, or the necessary control of the Sheriff over the court house and jail." This statute was re-enacted in each successive edition of the Revised Statutes. Sheriff Chandler had held possession of the property as Sheriff, and his son had paid rent for it up to 1851, and on the appointment of the defendant as Sheriff, late in 1858 or early in 1859, he had taken possession from the son of the former Sheriff. Defendant also claimed under a deed from Chandler, the former Sheriff, but it appeared that in 1862 he had voluntarily accepted office as one of the trustees of public property, and acted as such until 1875.

Held, that the moment the Act of 1848 ceased to have effect, the land vested in the trustees appointed under Revised Statutes, 1st Series, (1851,) and that, apart from the effect of the Revised Statutes of 1858, vesting the property in the trustees subsequently appointed within twenty years of the commencement of the action, the plaintiffs had not been twenty years out of possession at the commencement of the action, as the possession of the defendant and his associate trustees from 1862 to 1875 was the possession of the plaintiffs.

Trustees of Public Property v. *Kerr*..... 317

POSSESSION to sustain count for conversion.

See TROVER—2.

———— UNDER AGREEMENT TO PURCHASE.

See DOWER.

————, UNITY OF.

See RIGHT OF WAY.

PRACTICE

ADJOURNMENT.

At the trial the cause was continued a day to enable plaintiff to get a deposition which could not be found.

Held, that this was no objection to the verdict for plaintiff, as the Judge had discretion under R. S., cap. 94, sec. 210.

Foster et al v. *Lamie*..... 269

AFFIDAVITS.

The Court has rarely permitted affidavits to be produced under sec. 15 of the Evidence Act, R. S, cap. 96, and in the few cases in which they have done so, such course has been rendered necessary to prevent the grossest injustice, or to vindicate the standing of members of the Bar. On argument of a rule to set aside a judgment obtained against

defendant on the ground among others that the judgment had been entered in fraud of defendant and against good faith, the Court refused to allow defendant to produce affidavits in support of his rule, where the affidavits of plaintiff contained no new matter except in reference to the title of the defendant to the land on which the judgment formed a lien.
O'Mullin v. *McDonald*..... 201

——— FOR ATTACHMENT IN INSOLVENCY.

See AFFIDAVIT FOR ATTACHMENT, &c.

AMENDMENT OF RULE *nisi* FOR NEW TRIAL.

1. Rule *nisi* for new trial granted by the Judge on Circuit, allowed to be amended by inserting grounds brought to the notice of the Court by affidavit on the first day of term.
McCully v. *Dykeman*..... 482

2. On the reading of the minutes it appeared that the rule *nisi* for a new trial had been made returnable in the November term. Objection having been taken, the Court allowed the rule to be amended by substituting "December" for "November," and the argument proceeded.
Longley et al v. *Northern Insurance Company*..... 516

AMENDMENT OF PROCEEDINGS under Building Laws to have a structure declared a nuisance, by striking out the contractor,
In re City of Halifax v. *Seeton et al*..... 367

APPEAL.

1. Appeal from County Court dismissed on the ground that papers were not certified.
Freeman v. *Moran*..... 166

2. Appeal from County Court dismissed, the rule for appeal not having been served.
Mailman v. *Overseers of Poor*..... 167

See also infra ORDER FOR APPEAL, GROUNDS OF APPEAL *and* OPENING JUDGMENT.

APPEARANCE.

See infra WAIVER.

AWARD, SETTING ASIDE.

See AWARD.

BAIL.

The original plaintiff, who died after the commencement of the suit, the action being continued by his administrators, issued at Annapolis a writ of capias against one Cutler, returnable at Annapolis, directed to the Sheriff of Queen's or any other Sheriff, under which Cutler was arrested by the Sheriff of Halifax County, in his bailiwick, and held to bail, defendant becoming surety, and the condition of the bond being that Cutler should be rendered into the custody of the Sheriff of Halifax. The declaration in the suit against Cutler was on a bill of exchange drawn by Cutler and others and dishonoured, with particulars applicable to such a count, together with common counts laying the indebtedness in Cutler and said others, but after issue joined common counts were added, laying the indebtedness in Cutler only, and particulars accordingly. Judgment was recovered against Cutler, and an execution issued directed to the Sheriff of Annapolis in the usual form, but without any endorsement specially directing the Sheriff to take the body. No execution was placed in the hands of the Sheriff of Halifax, and the Sheriff of Annapolis, after holding the execution sixty days, returned *non est inventus*.

Held, that the execution had been properly placed in the hands of the Sheriff of Annapolis County in which the venue in the original action was laid, and not in Halifax where the arrest was made; that the objection as to the amendment of the writ could not prevail, as there was nothing before the Court to show the nature of the debt sworn to in the affidavit on which the capias issued or that the plaintiff had not recovered on the declaration as originally framed, but that in order to enable plaintiff to bring action against the defendant as bail, a writ should have been placed in the Sheriff's hands with instructions endorsed to take the body of the principal.
Gavaza v. *Black*..... 129

BAIL, NOTICE OF.

Rule *nisi* for new trial discharged, no notice of bail having been served during the Term or Sittings, as required by Rules of Court, p. 13.

Quære, whether the addition of a deponent is indispensable in an affidavit of justification.
Acadia Co-operation Society v. *Fraser*..... 100

BAIL PIECE.

Where a rule was taken under the Statute to set aside a verdict, and the words, "to respond the judgment," did not appear in the bail-piece, the Court pronounced the bail wholly insufficient.
Forsyth v. *Symonds*..... 54

BUILDING LAWS, PROCEDURE UNDER.

Parties proceeded against under the provisions of section 655 of the City Laws for infringement of the regulations relating to buildings are entitled to an information as in the case of *City of Halifax* v. *McLearn*, 1 Oldright, 690, if they require it, when, if the Court declares the structure to be a nuisance, the Council may order its removal, and it is not necessary to resort in the first instance to the Police Court, under section 654. (*See* note at end of the case).
In re City of Halifax v. *Seeton et al*..... 365

CERTIORARI.

1. Where no return was made by the Justices on a writ of certiorari directed to them, the Court held the objection a fatal one, refused to give judgment on the merits, and directed the papers to be sent back to the Magistrates, to deal with the cause as might be thought best.
Musker v. *Doran*..... 184

2. Writ of certiorari quashed, the affidavit on which it was issued not disclosing sufficient grounds, and there being no return to the writ.
Town of Pictou v. *McDonald*..... 334

See also CERTIORARI.

DOCKET.

See infra RULE.

EJECTMENT.

Three of the plaintiffs in an action of ejectment were clearly shown to be entitled to the possession of the land claimed, as tenants in common with others who were not joined in the action as plaintiffs.

Held, that the verdict, which was for plaintiffs, could not be set aside on the ground that the other tenants in common were not joined, or that the verdict did not state the proportion in which plaintiffs were entitled, the practice of this Court differing in this respect from the English practice.
Ellis et al. v. *Colonial Market Company*..... 196

ENLARGEMENT OF TIME TO FILE ANSWERS.

At a meeting of creditors of W. W. Rickards, an insolvent, under the Insolvent Act of 1869, held in May, 1873, objections were filed to the claim of Joseph S. Rickards, and duly served, about two years after which Joseph S. Rickards himself became insolvent. His assignee in 1878, Joseph S. Rickards having died in the meantime, obtained a rule granting him permission to file answers to the objections within fifteen days, contestant to have a like time to reply.

Held that, although under the Act of 1875, the Judge of the Insolvent Court had the discretion to grant an enlargement of the time for filing answers, and could make such an order even after the expiration of the three days prescribed by statute, in the present case, in which the application was not made until more than four years after the time when it should have been made to the assignee under the Act of 1869, the order could not be upheld.

In re Estate of Rickards..... 493

EQUAL DIVISION OF COURT.

See EQUAL DIVISION OF COURT

ESTREATING RECOGNIZANCE.

In order to estreat a recognizance taken under cap. 30, of the Dominion Acts of 1869, all that is required is a certificate from the proper officer, (under sec. 45 of the Act,) that it is forfeited. Upon that a rule *nisi* is taken out on affidavit of the facts, and if no cause is shown, judgment follows, but without costs.

Practice in the *Queen* v. *Thompson*, 1 Thomson, 9, affirmed.

The Queen v. *Hickman*..... 255

GROUNDS OF APPEAL.

A ground of appeal setting out that the judgment is contrary to law and the allegations and statements appearing in the bill and demurrer and the statute therein referred to, and also a ground setting out that the judgment should have been in favor of the defendants for the reasons and grounds raised by the demurrer, "which said reasons and grounds said defendants" (appellants) "here repeat as fully and to the like effect as if they were set out at length," *held* to be of no avail as being too general and indefinite; R. S. *cap.* 95, *sec.* 74.

A ground of appeal setting out that the Judge erroneously decided that the demurrer being bad in part was bad altogether, and that under the practice of the Court the said Judge should have given judgment upon the whole record, *held* bad, as relating only to practice and coming within the exception in R S., *cap.* 95, *sec.* 73.

Windsor & Annapolis R. Company v. *Western Counties R. Company*.... 376

See also APPEALS, &c.

See also infra ORDER FOR APPEAL.

JOINDER OF TOO MANY PLAINTIFFS.

The Trustees of Public Property brought an action of ejectment, and at the trial obtained an order to amend the declaration, and added as plaintiffs the Trustees of Amherst Court House Grounds. The verdict was for plaintiffs, but, after argument *in banco*, it appeared that only the Trustees of Public Property, &c., were entitled. *Held*, that the joinder of the Trustees of Amherst Court House Grounds was mere surplusage.

Trustees of Public Property v. *Kerr*..... 317

JUDGMENT *de retorno habendo*.

See REPLEVIN—1.

NON-PROS.

Notice of non-pros may be given at the close of the second sittings after the cause is at issue, although the cause has not been called and passed.
General Mining Association v. *Victoria Coal Mining Company*.... 479

NOTICE OF TRIAL.

Where the venue, originally laid at Halifax, was changed to Sydney, C. B., by rule made absolute on the Tuesday next preceding the Tuesday on which the October term opened at Sydney, but not served until the following day, and the plaintiff did not proceed to trial at the October term, but tried his cause without notice at the June term thereafter, and obtained judgment, the defendant not appearing, the Court set aside the judgment, without costs.
Harvie v. *McKay*..... 95

See also infra OPENING JUDGMENT.

OPENING JUDGMENT.

The cause being at issue and for trial in the County Court at Antigonish, it was agreed by the parties to refer it to arbitration, but no steps were taken to that end by either party, and on the cause being called on the docket on the first day of the sittings, defendant's counsel not answering, plaintiff obtained judgment under the practice in R. S., cap. 94, sec. 202, which did not come to the knowledge of the defendant until more than a year afterwards. Defendant then obtained a rule *nisi* from the County Court Judge to set the judgment aside on the ground, among others, that no proper notice of trial had been given, but the Judge discharged the rule *nisi*, on the ground that it had not been moved for within a year. An appeal was allowed on the grounds that appeared in the rule *nisi*.

Held, that an appeal lay from the decision of the County Court Judge, under the Act of 1878, cap. 9, sec. 14; that the Judge of the County Court had an inherent right to open up the judgment, even after the lapse of a year to let in a trial on the merits; that the plaintiff's notice of trial was bad, there being no place named where the trial was to be held, and, therefore, that this Court must deal with the judgment as if there had been no notice of trial.

WEATHERBE, J., though concurring in the result, questioned whether the provisions as to appeal in the statute of 1878 were applicable to the case, as the action had been commenced previous to 1878, and held that the provisions in the Act of 1877 were not applicable, as there had been no trial, but that there was an appeal by sec. 53 of the Act of 1874, cap. 18, which he held to be unrepealed.
Anderson v. *Taylor*..... 526

ORDER FOR APPEAL.

An order for appeal was signed by the Judge, setting out a number of grounds, but the Judge in his certificate left it to this Court to say whether an appeal could be allowed in an action of tort where the judgment was under $40.

Held, that the appellant could not be confined to this single ground of appeal, the Judge having a discretion under the Act of 1878, c. 9, s 14, to allow an appeal on any point of law or practice in any matter tried or argued before him, and having granted an order setting out the grounds on which appellant wished to rely.
McDonald v. *Stirskey*..... 520

ORDER FOR DISCHARGE OF ASSIGNEE re-opened after expiration of time for Appeal.

See ASSIGNEE, re-opening order, &c.

PARTIES.

The allegations contained in an order in Council may be questioned in a suit without making the Crown or Government a party to the suit.
Windsor & Annapolis R. Company v. *Western Counties R. Company*.... 376

See also supra; EJECTMENT.
See also PLEADINGS; Declaration.
See also supra JOINDER OF, &c.

PLEADING.

Q. Whether the plaintiff, in an action of trover, having admitted a tenancy in common with the defendant, the latter could avail himself of that defence without a plea.
Brittain v. *Parker et al*..... 389

RELATOR.

In an action on a bond to the Queen under chapter 75, R. S., "of Licenses," &c., an attorney was named on the writ, but it was not shown at whose instance or for whose advantage the action was brought. The Court passed an order staying the action until plaintiff's attorney should endorse on the writ the name of the Clerk of License, or such other person at whose instance the action was brought, to respond the judgment.
The Queen v. *McKarcher*..... 387

REPLEVIN, REPLICATION IN.

Defendant in replevin avowed for rent, and plaintiff did not reply, relying on the statutory replication denying the facts alleged in the plea.
Held, that a replication was necessary to put the cause at issue.
Leave given to file a replication.
Bremner v. *Wallace*..... 481

REPLICATION IN REPLEVIN.

See PRACTICE, Replevin.

RULE.

A rule returnable on the first day of term is the same as a four day rule and must go on the docket, unless special circumstances are shown.
McDonald v. *Mitchell et al*..... 274

SERVICE OF ELECTION PETITION.

See ELECTION PETITION.

SETTING ASIDE AWARD.

See AWARD.

VENUE, IN CRIMINAL CASES.

See COMPOUND FELONY.

WAIVER.

An appearance and plea, under protest, served but not filed, *held* no waiver of the right to move to make absolute a rule *nisi* to set aside the writ obtained before the appearance.
Carty v. *Bennett et al*..... 293

PREFERENCE, FRAUDULENT.

See INSOLVENT ACT OF 1869—2 & 3.

PROBATE COURT, Costs of Proceedings in.

See COSTS.

————————, JURISDICTION IN PARTITION OF LANDS.

The real estate of the intestate was partitioned by commissioners appointed under the Probate Act, who, by their report, left a certain portion of the land undivided. This partition was confirmed by order of the Court, the estate having been previously settled by decree of the Judge of Probate, which was in evidence. Afterwards, W. Hawkins, husband of one of the heirs of intestate, petitioned the Judge of Probate for a partition of the undivided portion, and a large body of evidence of possession was put in on both sides, the whole of which this Court held to be futile and unnecessary, as there was no ground for sustaining any possession in either party that could influence the decision. The Judge of Probate dismissed the petition on the ground that he had no power to settle disputed questions of title. On appeal to the Judge in Equity this decision was overruled, and the Judge of Probate directed to proceed with the cause, which he did, and dismissed the petition on the merits, dividing the costs between the litigants.

Both parties having appealed, *held*, that the final decree above referred to was evidence, with the other evidence before the Court, of the final settlement of the estate by the Judge of Probate; that after such settlement his jurisdiction over any unsold or undivided portions ceased; that the objection for want of jurisdiction was rightly taken at any stage, and that the appeal of the petitioner Hawkins must therefore be dismissed.

In re Estate of John Simpson..... 357

PROMISSORY NOTE.

To an action on a promissory note given for the value of shares in a registered vessel, transferred by bill of sale from plaintiff to the defendants, the defendants set up as a defence an oral agreement that the note should not become due until the actual delivery of the property, which, as a matter of fact, had been seized in execution before defendants obtained actual possession.

Held, that the alleged agreement could not be admitted to vary the terms of the defendants' unconditional written promise.

Defendants accepted and registered the transfer of the shares, and demanded possession of the vessel, asserting their right as *bona fide* owners, yet they attempted to set up fraud as an answer to this action, not specifying whether such fraud was against themselves or against a third party.

Held, that defendants could not sustain the verdict in their favor on this point without showing that they were induced by fraud of the plaintiff as against themselves to make the note in question.

Taylor v. *McFarlane et al*..... 190

————————, FORGED ENDORSEMENTS ON.

See PARTNERSHIP—1.

————————, SATISFACTION AND DISCHARGE OF.

See Duffus v. *McLearn*, (foot-note)..... 259

————————, STAMPS ON.

See STAMPS.

PROPERTY to sustain count for conversion.

See TROVER—2.

PROTHONOTARY compelled to account for interest on money paid into Court.

See INTEREST ON MONEY DEPOSITED WITH PROTHONOTARY.

PUBLIC INSTRUCTION.

See SCHOOL ASSESSMENT.

QUORUM of Bank Directors, power of to make calls.

By the Act of 1871, c. 5, s. 32, not less than three Directors were constituted a quorum for the transaction of business. By s. 30 it was provided that Directors should be elected by the shareholders at the annual meeting, and that vacancies should be filled in the manner provided by by-laws, which, by another section, a majority of the Directors for the time being, was empowered to make, but which had never in fact been made. In March, 1874, three of the Directors appointed one Innes a Director to fill a vacancy, and in September, 1874, a call was made by four Directors, one of whom was Innes, who seconded the resolution.

Held, that although Innes was not legally a Director, the call was valid, three of the Directors who made it being legally qualified.
Bank of Liverpool v. *Bigelow*..... 236

RECOGNIZANCE, Estreating.

See PRACTICE; estreating recognizance.

RELATOR.

See PRACTICE; relator.

RELATIONSHIP OF JUSTICE TO PARTY.

Conviction for cruelty to animals quashed, one of the Justices being the father of the complainant.
In re D. Barry Holman..... 175

REPAIRS, Lien for.

See BAILMENT.

REPEAL OF STATUTES.

See SEWERS—1.

REPLEVIN.

1. Where plaintiff discontinued an action of replevin, the defendant having possession of the goods under a return bond, the Court declined to allow the defendant to try the cause, or to enter up judgment *de retorno habendo*, but passed a rule for judgment for the defendant, with costs.
Evans v. *Ross*..... 50

2. Plaintiff held a bill of sale of a pair of oxen from McLeod, the owner, who continued in possession, the bill of sale being duly recorded, and upheld as valid by the Jury. After making the bill of sale, McLeod was arrested at the suit of defendant, and, on swearing out of jail,

assigned the oxen to the defendant, who sold them at auction to Wade; whereupon plaintiff, under a writ of replevin against defendant, took the oxen out of the possession of Wade, who was no party to the suit. Plaintiff having obtained a verdict, the Court set the verdict aside, with costs, non-suited the plaintiff, giving the defendant the costs of action but not of the trial, and directed the bond to be put on file, subject to the order of the Court or a Judge.

Fraser v. *Bruce*..... 61

3. Sec. 330 of cap. 74, R. S., 4th Series, prevents the replevying of goods seized by and in the custody of the Sheriff, under process out of the Courts therein referred to, though such goods are those of a third party, a stranger to the cause in which the process issued; and where other defendants, acting in the Sheriff's aid and under his authority, are joined, the writ will be set aside as to all the defendants.

Carty v. *Bonnett et al*..... 293

REPRESENTATION in slip for Marine Insurance.

See INSURANCE, MARINE—2.

———————— FALSE, as to building being a nuisance.

See PLEADINGS, Declaration and Plea.

REQUEST.

See MONEY PAID.

REQUISITION for meeting to vote School moneys.

See SCHOOL ASSESSMENT

RIGHT OF WAY.

In order to acquire a right of way by enjoyment for twenty years, it must be proved that the claimant has enjoyed it for the full period required, *as of right*, and if there has been unity of possession for all or any part of that time the claimant will not have enjoyed as of right the easement, but the soil itself. A defence on this ground to a claim of right of way, is sufficiently put in issue by a plea that the claimant is not entitled to such right of way, as alleged.

Quære, whether a tenant at will has such an estate as will entitle him to maintain an action for obstructing a right of way.

Smith v. *McDonald*..... 283

RULE returnable on the first day of Term.

See PRACTICE—Rule.

SCHOOL ASSESSMENT.

Section 34, sub-section 8, of the chapter of Public Instruction, R. S., cap. 32, provided that it should be the duty of the Trustees to call a special meeting of the section, due notice being given by the school or otherwise, for the purpose of, &c., and for any other necessary purpose. Section 37 required the Trustees, upon the requisition of a majority of the ratepayers, to convene a special meeting of the ratepayers for the purpose of voting money or adding to any amount previously voted. At the annual meeting of school section 29, the money required for schools was not voted, and the meeting instructed the Trustees to call another meeting for the purpose, which they did, but

acted under the impression that the meeting must be called under a requisition, as provided by section 37. The matter was brought up by certiorari, and a rule *nisi* taken to set aside the assessment, the affidavits on both sides being drawn up on the assumption that the meeting could only be called under section 37, requiring a requisition from a majority of the rate-payers.

Held, that no such requisition was necessary, that the Trustees could call the meeting of their own motion, and that, whether the requisition was signed by a majority of the ratepayers or not, the action of the meeting was legal and valid.

In re School Section No. 29..... 207

See also DARTMOUTH, LIABILITY OF, &c.

SECONDARY EVIDENCE.

Plaintiff sued defendants for work done for the British Gold Mining Co., and, together with other evidence, produced a witness who said he had been one of a deputation that had waited upon the manager of the company to ascertain of whom it was composed, and that said manager had produced a document and read it, stating that T. W. and J. W., the parties sued, (with others whom he named), were the parties concerned in the company; that the document was then handed to witness who read part of it to the company present, who were quite satisfied that there was such a company This statement was held to be admissible as secondary evidence of the document.

Lockhart v. *Watson et al*..... 543

SENILE DEMENTIA.

See WILL—2.

SERVICE OF ELECTION PETITION, enlargement of time for.

See ELECTION PETITION.

SET OFF.

To a declaration by plaintiff for the price of one half interest in a horse alleged to have been sold by plaintiff to defendant, plaintiff retaining the other half interest, defendant pleaded among other pleas a set-off for the keep and care of the horse, and expenses connected with taking the horse to and from Truro, while the joint ownership lasted. The Judge of the County Court ruled that defendant could not offset his account, as that would be offsetting a partnership matter, depending upon an adjustment of accounts between the parties, plaintiff's claim being for property brought into the partnership.

Held, that the rejection of the set-off was wrong, and that the judgment below must be reversed.

McDonald v. *Power*..... 340

SETTING ASIDE JUDGMENT.

See JUDGMENT SET ASIDE.

SETTLEMENT.

See MERGER.

SEWERS IN THE CITY OF HALIFAX.

1. The Sewerage Act of 1873, cap. 14, provided that wherever two-thirds of the rate-payers in any street, &c., should petition for a sewer, the same should be constructed, and that one-fourth of the cost should be paid by a special assessment on the owners of real estate, such assessment to be payable immediately on the completion of the sewer. The Act of 1874, passed May 7th, repealed these provisions, and provided that where one-half the owners of property on any street, &c., petitioned and deposited the amounts chargeable according to the Act, the Council should order a drain to be constructed. Preliminary steps having been taken for the construction of a sewer past defendant's property, on April 22nd, 1874, the report of the engineer was accepted, and the Board of Works authorized to carry it into effect, but the tender and contract bore date respectively June 15th and July 2nd, 1874. The suit was instituted under the Act of 1873.

Held, affirming the decision of the County Court, that there were no acquired rights on the part of the city against the defendant under the Act of 1873, and that, the Act of 1873 having been repealed, the plaintiff must be nonsuited.

City of Halifax v. *Edwards*..... 104

2. The Provincial Act of 1873, cap. 14, sec. 1, empowered the Board of Commissioners of City Works, under the sanction of the City Council, to order the construction of a sewer along any street, without the requisition of owners of property along the street, and the Act of 1874, cap. 32, sec. 1, provided that, upon the petition of half the owners of property on any street, and the deposit with the City Treasurer of certain amounts chargeable under the Act, the City Council should order a sewer to be constructed unless for sufficient reasons to the contrary. The Act of 1874 further repealed a section of the Act of 1873 and substituted therefor a section, pointing out the manner in which the cost of construction should be borne and providing that all moneys chargeable to property owners under that Act should become due from the order or resolution to construct a new sewer, whether such sewer had been petitioned for, or ordered by the Council for the benefit of the city without petition. The owners of property on South Park Street applied by petition for a sewer from Victoria Road along South Park Street to Inglis Street, 480 lineal feet. The City Engineer reported upon the petition that, in order to provide a proper outlet for the proposed sewer, it would be necessary to build 850 lineal feet down Inglis Street; upon which the Council passed a resolution, 'that the petition of the rate-payers in South Park Street *and Inglis Street*, for the construction of a sewer *on said streets*, together with the report of the engineer thereon, be received and adopted, and that the Board of Works be requested to have such sewer constructed.' The sewer was constructed, and a suit brought against defendant, who lived on Inglis Street, for his portion of the cost of construction on Inglis Street.

Held, that the Council had power to order the construction of a sewer on Inglis Street without any petition, to the cost of which property owners on that Street were bound to contribute, and that the resolution might be regarded, first, as authorizing the construction of a sewer on South Park Street in compliance with the petition of the property owners on that street, and, secondly, as an order emanating from the Council itself for the construction of a sewer on Inglis Street, irrespective of any petition.

City of Halifax v. *Seeton*..... 245

SHAREHOLDER OF BANK, what constitutes.

See ESTOPPEL—4.

SHERIFF, action against.

See ESTOPPEL—2.

————, TROVER AGAINST.

To an action for converting goods of the plaintiff, taken by the defendant, a Sheriff, out of the possession of plaintiff's father, who had formerly owned the goods, defendant, attacking the transfer on the ground of fraud, pleaded a justification under an execution, and on the trial put in evidence the execution but not the judgment. The Judge instructed the jury that if a transfer had taken place to the plaintiff, the defendant should have shewn the judgment as well as the execution.

Held, that this was no misdirection.

Hannon v. *McLean*..... 101

————, REPLEVIN AGAINST.

See REPLEVIN—3.

SLANDER.

Defendant used, in reference to plaintiff, the words "stud" and "mare-rider," for which plaintiff brought an action of slander, with an *innuendo* attributing to the words the meaning that plaintiff had committed the crime of buggery. The Court set aside the first verdict on the ground that the words were not actionable *per se*. On the second trial the only evidence adduced by way of foundation for the question as to the sense in which the words were understood was that of rumors in the neighborhood that the plaintiff had committed such crime, but it was not shown that these rumors were known to the defendant.

Held, that the evidence had been improperly admitted, and that the verdict for plaintiff must be set aside.

Grant v. *Simpson*..... 141

SLIP, false representation in.

See INSURANCE, MARINE—2.

STAMPS.

1. Plaintiffs brought action as indorsees of a promissory note made by defendant, endorsed by Collie & Spencer, for whose accommodation it had been made, to C. J. Morton & Co., who endorsed it to Sylvanus Morton, by whom it was endorsed to the plaintiffs. The note was stamped to the full amount required when it came into the plaintiffs' hands, but it had no stamps on it when signed by defendant, who swore that the initials on six of the nine stamps appearing on the face of the note were not his initials; and had not been placed there by his authority. He stated, however, on cross-examination, that Collie said when the note was signed that he would put stamps on it at his office. To this the defendant made no objection;—and Collie swore that the initials were made by a clerk in his office on the very day the note was signed.

Held, that the note was legally stamped.

Duffus et al v. *McLearn*..... 259

2. Defendant made a note of hand to S., which was endorsed to plaintiff who received payments on account of it from time to time from the indorser. Defendant made no payments, but, after six years from the date of the note, made a new note to plaintiff for the balance due on the original note, the stamp on which, bearing date identical with the date

of the note, was for the single duty, and was affixed by plaintiff on the day subsequent to the delivery of the note to him.

Held, that the stamping was insufficient, and that the note could not be received on the trial as an acknowledgment to take the case out of the statute of limitations, that the payments by the endorser did not enure to prevent the operation of the statute as against the maker, and that the mere striking of a balance as between the parties did not constitute an account stated to take the case out of the statute.

McFatridge v. *Hunter*..... 289

3. Plaintiff, J. H. Troop, along with C. J. Troop, made a note to defendant for a debt due to defendant by C. J. Troop. The jury found that there were stamps on the note when signed. It appeared that the stamps afterwards became detached, and defendant said; "I affixed the stamps to the note when it was brought back to me by C. J. Troop, and obliterated the stamps." This was not done in plaintiff's presence, nor by his direction, nor by the direction of C. J. Troop.

Held, that, although the assent of C. J. Troop might be implied, he could not be accounted the agent of his surety for obliterating the stamps, and that neither his direction nor his assent would have satisfied the statute 31 Vic., c. 9, 1867.

Troop v. *Troop*..... 362

STATUTES, Repeal of.

See SEWERS, &c.,—1.

SURETY, Action against.

See PRACTICE, Bail.

SURGEON'S FEES.

See ASSUMPSIT, IMPLIED.

TEACHER'S SALARY, Attachment of.

Plaintiff obtained a garnishee order which was made absolute on the 18th of June, without notice to the defendant, to attach the salary payable to defendant as school teacher in the town of Pictou, for the quarter ending August 1st.

Held, that there was here no debt, but only a portion of a salary, and that salary not attachable under the English rule and the policy of the provincial statute; and that, as the rule of 18th June had been passed without notice to the defendant and without argument, it must be rescinded with costs.

Fraser v. *McArthur*..... 498

TENANT AT WILL.

See RIGHT OF WAY.

TENANT IN COMMON, action by against co-tenant.

Plaintiff brought an action of trover for logs cut and piled by him for his own use on land formerly belonging to John Lytell, who had died intestate, leaving three heirs, among whom were the plaintiff's wife and one of the defendants. A general verdict for the full value of the logs was found for the plaintiff, under the direction of the Judge.

Held, that the verdict must be set aside on the ground of misdirection so far as it affected the damages, as, even regarding the defendants as

wrong-doers, the plaintiff was only entitled to one-third. JAMES, J., *dubitante.*

Q. Whether, the plaintiff having admitted a tenancy in common with defendant, the latter could avail himself of that defence without a plea.

Brittain v. *Parker et al*..... 589

——————————, NOT JOINED IN EJECTMENT.

See PRACTICE, Ejectment.

TROVER.

1. Plaintiff hired defendant to travel and sell certain goods for him for cash or approved notes, to return such goods as were not disposed of and account for the proceeds of those sold. Defendant having failed to account, this action was brought, the declaration containing a count in trover and a count for money had and received. Defendant having been shewn plaintiff's account for the goods, by his attorney, admitted it to be in the main correct, and offered to pay $100, (being less than the plaintiff claimed,) which was refused, and on plaintiff's attorney asking defendant if he would neither account for the goods, nor give them up, nor pay for them, defendant said he would do neither. *Held*, that this answer was no evidence of a wrongful conversion, there being no evidence that the defendant, when he made it, had any of the goods in his possession, as he had previously stated to plaintiff that he had sold them all.

Walker v. *Cunningham*..... 1

2. A check, payable to the plaintiff, or order, was mailed to the plaintiff's address, but he did not receive it, and it appeared that a few days afterwards a young man whom plaintiff had previously dismissed from his employ had brought the check, with the plaintiff's name endorsed on it, without authority, to the Bank, and had drawn the money. Plaintiff's attorney wrote to defendants demanding the money but not the check, and defendant's attorney replied that if plaintiff would write a letter to the Bank declaring the endorsement a forgery, and stating that he would be prepared to give evidence if required, the amount would be paid. Plaintiff's attorney then wrote to defendant's attorney asking that defendants would pay or restore the check. The check was handed by the Bank to the plaintiff on condition that he would return it, which he did, but it was not delivered to him as his own property.

Held, that the demand to pay or restore the check was a sufficient demand of the check, but that plaintiff had no such property in the check and no such possession of it as would entitle him to maintain the action, and, even if he had, that the defendant's refusal was not such an absolute refusal as to constitute a conversion.

Annand v. *The Merchants' Bank*..... 329

———— AGAINST SHERIFF.

See SHERIFF, TROVER AGAINST.

TRUSTEES OF SCHOOLS, power to call meeting to vote moneys.

See SCHOOL ASSESSMENT.

UNDUE INFLUENCE.

See WILL—1, 2.

VENUE, in Criminal Cases.

See COMPOUND FELONY.

VERDICT, EXCESSIVE.

See INSURANCE, FIRE—2.

WAIVER.

See INSURANCE, FIRE—1
See also PRACTICE; Waiver.

WARRANT OF ATTORNEY, Judgment under, set aside.

See JUDGMENT SET ASIDE.

WEIGHT OF EVIDENCE.

See APPEALS FROM COUNTY COURT—2, 3, 4.

WILL.

1. Testator was a man of religious habits and a member of the Methodist Church. A fortnight before his death he had matured the sketch of a will, substantially similar to the one executed, which left considerable property to the Church. On the afternoon of the Monday before his death he sent for Henshaw, one of the executors, who came in the evening and took instructions from testator for drawing the will which was prepared next morning. When these instructions were taken there were four persons present besides the testator and Henshaw, three of whom were interested in sustaining the will, but neither of these was produced as a witness, nor were the instructions produced, although the Court had adjourned for the purpose of enabling them to be obtained; and Troop, who was present and adversely interested, had been sent out of the room, without it being shewn that it was by testator's request. The witnesses present at the execution, which took place on the Wednesday before testator's death, differed greatly in their statements as to what then took place, but it was admitted that one clause of the will had been intentionally read to testator differently from the way in which it appeared in the will, and that testator made no remark. His name was added to the will by one of the executors without his consent having been asked for or his authority given, and he died the next day.

Held, that the decision of the Judge of Probate setting aside the will must be sustained; costs to be paid out of the estate.

In re Estate of Pine..... 307

2. Testator made four wills, all in the year 1875, by the first of which, made April 6th, while residing at Halifax, at the house of his cousin, Charles Beamish, he left nearly half of his property to said Beamish, and the other half in trust for Mrs. H. A. N. Kaulback, in whose favor the fourth will, being the one in question, was made, to the exclusion of Beamish, on the 15th November, and while the testator was residing at the house owned and occupied by him in Lunenburg. The subscribing witnesses to the will both testified clearly to the testator's soundness and capacity. Two respectable witnesses beside Beamish, speaking as to September and the latter end of October, 1875, described the testator as being childish and imbecile, concurring in this opinion with the testators's nurse and her daughter, the evidence of the former of whom was not considered worthy of attention, for reasons appearing in the judgment. On the other hand, a number of intelligent witnesses, seven or eight, including testator's clergyman and physician who had visited him

down to the time of the making of the will in dispute, and afterwards to the time of his death, testified strongly to his mental soundness and vigor. Testator had been on terms of great intimacy with Kaulback while at Lunenburg, where he lived from 1872 to the time of his death, spending the greater part of his time at Kaulback's house until it was destroyed by fire, after which Kaulback and his family lived with testator. Kaulback was his occasional banker and solicitor, and much evidence was tendered to show that he had immoderately supplied the testator with liquor. The draft of the will was in Kaulback's writing, but was sworn by him to have been copied exactly, at testator's request, from a will prepared by testator in August, with alterations suggested by the testator, and copied *verbatim*.

The will having been attacked on the grounds of senile *dementia* and undue influence, *Held*. sustaining the decision of the Judge of Probate, that the will must be confirmed.

The Court was equally divided upon the question of costs, YOUNG, C. J., and DESBARRES, J., considering that each party should pay his own costs, SMITH and JAMES, J J., that they should be paid out of the estate. No order was made as to costs.

In re Beamish Murdock's Will..... 427

WORDS "stud" and "mare-rider" not actionable *per se*.

See Grant v. *Simpson*..... 141

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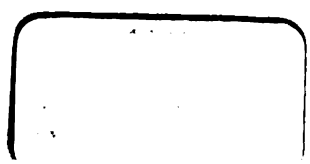
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